

Neutral Citation Number: [2026] EWCA Civ 1389

Case No: CA-2026-000940

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
Mrs Justice Jefford
[2025] EWHC 3315 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 November 2026

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE PHILLIPS
and
LORD JUSTICE STUART-SMITH

- -

Between:

VIVID HOUSING LIMITED

Claimant / Respondent

- and -

ALLIANZ GLOBAL CORPORATE & SPECIALTY SE

Defendant / Appellant

- -
- -

Rachel Ansell KC and **Martyn Naylor** (instructed by **Clyde & Co LLP**) for the **Appellant**
Charlie Thompson and **Courtney Burrell-Eade** (instructed by **Capsticks Solicitors LLP**) for the **Respondent**

Hearing date: 20 October 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 November 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

Introduction

1. The respondent ("Vivid", the claimant below) is the freehold owner of a block of 72 flats at Collins Place, 189 Victoria Road North, Portsmouth, Hampshire. Vivid is, in effect, the insured under a Housing Warranty Insurance Policy issued in respect of the development. The insurance policy was issued by Building LifePlans Ltd. ("BLP") acting as the cover-holder under a binding authority granted by the appellant ("Allianz", the defendant below).

2. The operative clause of the policy is clause 3(a), which provides:

> "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."

3. The Period of Insurance was from 22 May 2008 to 21 May 2020. On or about 19 May 2020 Vivid notified a claim under the policy. It alleged the existence of five defects, of which one is not in issue in this appeal. The four remaining defects were:

> "(i) Defect 1 (Rockpanel cladding): Vivid alleges that combustible RP cladding panels have been installed on a building over 18m high in an untested arrangement in conjunction with combustible foam insulation, absent carrier [*sc.* cavity] barriers or with defective barriers, and with combustible debris in the cavities, which provides a vehicle for the spread of fire and/or smoke around the entire external envelope of the building.
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> (ii) Defect 2 (vertical cavity barriers): Vivid claims that no vertical cavity barriers were installed at the required locations (for example between the outer cladding and inner cavity and between floors) which provides a route for fire and/or smoke to spread unseen and uninhibited around the development.
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> (iii) Defect 3 (horizontal cavity barriers): Vivid alleges missing or defectively installed cavity barriers at party walls, slab edges and window openings as a result of which fire and smoke could spread unseen and uninhibited around the development.

> …
>
> (v) Defect 5 (building debris): Vivid's case is that debris was left within building cavities providing an ignition source for fire and/or permitting the spread of fire and, additionally, that the debris provided a bridge for water into the flats causing consequent or additional damage."

4. This is an appeal from a decision of Jefford J dated 16 December 2025 by which she dismissed the majority of an application by Allianz for summary judgment in respect of the remaining defects. The appeal has involved an intense focus on the words of Clause 3(a)(iii) and, in particular, on the words "the threat of imminent destruction or physical damage to the Premises" in the context of the contract as a whole.

The factual background

5. As recorded by the Judge at [J6], Allianz asked the court to determine the application on the basis of assumed facts, namely that the alleged defects are Defects within the meaning of the policy. Furthermore, despite the existence of an exclusion clause (Clause 4(a)(iv)), which on its face excluded cover for the threat of imminent destruction or physical damage arising from or consequent upon fire "for the purposes of this summary judgment application but only this application, Allianz did not rely on this argument or on this exclusion as material to the construction of Clause 3".

6. Vivid notified its claim under the policy by a standard "Latent Defect Claim Form". Box 5 on the standard form said "if urgent repairs are required, please specify what they are and provide an estimate of the cost". The answer given by Vivid was "N/A" to both limbs of the request. Box 6 asked whether any repairs had been undertaken prior to notification. The response was ""Waking Watch" preventative and associated measures". The date given was "Throughout" and the cost was "TBC".

7. The primary evidence about the alleged defects is currently included in a report from CBRE entitled "Façade Fire Risk Assessment". The report includes a Key Point Summary which allocates one of three colour-coded levels of priority: green ("No Current Issues – Low risk materials"), orange ("Important issues/Actions – Medium risk materials") and red ("Critical issues/ Action – High risk material"). The use of Rockclad Rockpanel and defects in workmanship were assessed as having orange priority status. The absence of compartmentation was assessed as having red priority status. The report stated the obvious: the absence of compartmentation increased the risk of spread of fire in the façade cavity.

The Judgment below

8. Having summarised the contentions of the parties, the Judge commenced her consideration of the issues at [J17]. She subdivided the risk insured as being a (manifest) Defect which causes (a) the threat (b) of imminent destruction or physical damage (c) which requires immediate remedial measures (d) for the prevention of destruction or physical damage within the Period of Insurance. She held that there was no magic in the word "threat" and that in other cases and policies words such as risk or danger are used, which amount to the same thing: [J20]. She accepted that the threat must be of imminent destruction or physical damage: [J22]. Having referred to *Gerling*

General Insurance Co and others v Canary Wharf plc [2003] EWHC 2234 (Comm), which involved a different wording in a different form of contract, she held at [J29] that the normal usage of the word "imminent" had a temporal element as articulated in [55] of *Gerling* where Christopher Clarke J 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 and provisions of the Policy to which I have referred."

9. After consideration of the judgment of HHJ Stephen Davies in *Zagora Management Ltd v Zurich Insurance plc* [2019] EWHC 257 (TCC), she identified at [J39] that on one view (which reflected Allianz's case) "the only circumstances in which there is such a threat of imminent destruction or damage is if there is, in fact, a fire."

10. The core of the Judge's reasoning on this point was then set out at [J40]-[J45] as follows:

> "40. Ms Ansell rightly emphasised that the insured event is a threat of imminent damage or destruction and not an imminent threat of damage or destruction. However, in my view, in many factual scenarios it is not possible to distinguish between the two. In this case, if there is a fire, there will almost certainly be a threat of imminent damage at least and possibly destruction. But it would not make sense if the question of whether there was a threat of imminent damage or destruction was only to be asked and answered at a time when there was a fire. *In my judgment, to answer the question of whether there is a threat of such imminent damage or destruction involves asking whether in August 2019 the risk of fire was sufficiently serious and would eventuate sufficiently soon.*
>
> 41. On Allianz's case, there is no evidence that there was a threat of an imminent fire or an imminent threat of fire such that there could be a threat of imminent destruction or damage. It is submitted that there is, therefore, no basis on which the court could conclude that a reasonable observer would have concluded that there was such a threat of imminent destruction or damage as at August 2019. … *It seems to me that the effect of that argument is that it is Allianz's case that the policy would only respond to Defects (that for the purposes of this application are assumed to exist) if there was some particular aspect of the property or the Defect that made the ignition of a fire imminent.*
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> 42. Ms Ansell further placed some reliance on the fact that the notification identified no urgent repairs and that no remedial

> works had been undertaken since the CBRE report but only the waking watch. Neither of these arguments seems to me to be material and certainly not decisive. *The terms of the notification cannot determine the construction of the policy and the meaning of the insured event* and, in any case, the question posed in respect of which the answer "N/A" was given was one in respect of "urgent" repairs which does not reflect the terms of the policy. The waking watch, if anything seems to me, to point the other way and to reflect the concern that if a fire broke out the consequences could be catastrophic damage both to persons and property which is more consistent with a threat of imminent destruction or damage.
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> 43. Mr Thompson on the other hand submitted that the threat of fire is constant and the schedule of fires is indicative of the frequency of occurrence and the variety of causes. In that case there is always a threat of imminent damage or destruction by fire. There is considerable force in that argument. I recognise that, *on one view*, it would seem to take away or omit any consideration of whether the threat of destruction or damage is likely to occur sufficiently soon. But it would not be a commercial construction of the policy if the insured had to demonstrate an imminent threat of fire in the sense of a fire about to break out so that damage from fire was sufficiently likely to occur sufficiently soon whether because there was some aspect of the property or the Defect that made ignition imminent or for some other reason. *If so construed, it is difficult to see how the policy would ever respond to the risk of fire not least because (i) the time at which the Operative Clause was engaged was when the potential cause of damage, namely fire, had eventuated or was about to eventuate and (ii) the insured might be expected to take steps to remove the threat*. As I have said, the waking watch reflects the imminent threat because of the multifarious ways in which a fire may occur and at least the view of Vivid that it may occur sufficiently soon.
>
> 44. *In other words, I do not consider that it can be said that there is no realistic prospect of Vivid establishing that the reasonable observer in August 2019 would form the view that there was a serious risk of fire and the consequent threat of destruction or damage sufficiently soon.*
>
> 45. I observe that that conclusion is driven by the very specific nature of fire and its causes and the factual assumption for the purposes of this application that the Defects are defects in the structural works within the meaning of the policy. …" (Emphasis added)

11. The Judge then turned to the second limb of clause 3(a)(iii) – the requirement that the threat requires immediate remedial measures for the prevention of destruction or physical damage within the Period of Insurance. Her response was:

> "48. It is self-evident that whether an event falls within this definition will depend on the facts. The most likely scenario would seem to me to be that if there is a threat of imminent destruction, remedial works will be necessary. *If the destruction or damage is unlikely to occur or will not occur within the Period of Insurance, the policy would not respond.* So in the structural deterioration example, if the failure would not, on the balance of probabilities, occur within that period, the policy would not respond. By the same token the threat would not be imminent. *On the other hand, if the threat is one of imminent destruction or physical damage, it is difficult to envisage a case where that would not necessitate immediate repair* or, as a minimum, mitigating measures pending repair. In other words, the two elements of the event lead to the same conclusion.
>
> 49. In the case of fire, if there is a threat of imminent destruction or damage, remedial works to prevent that occurring within the period of the policy would be necessary and most probably necessary immediately. That would at least be open to argument on the evidence." (Emphasis added)

12. At [J50] the Judge held that this was to be judged by the test of the reasonable observer at the time the Defects became manifest. She held that the test is an objective one, allowing that the fact of no remedial works being undertaken could be of some relevance in applying that test. She regarded one of the purposes of a waking watch as being to prevent fire spreading sufficiently to cause physical destruction or damage, thereby delaying the need to carry out remedial works. She implicitly rejected the suggestion that the effect of taking such steps was to support the argument that there was no need for immediate remedial works. At [J51]-[J56] she rejected Allianz's submissions based on the policy basis of settlement and the Health and Safety Extension (which had not been implemented).

The Grounds of Appeal

13. There is one ground of appeal, though Ms Ansell subdivided it for the purposes of her submissions. The single ground is:

> "1. The Learned Judge erred in law by construing clause 3(a)(iii) of the relevant 'latent defects' insurance policy, which provided cover where a "Defect" caused "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", in such a way that damage or destruction by fire is always "imminent" (see paragraph 43 of the Judgment: "there is always a threat of imminent damage or destruction by fire") and that "immediate remedial works" are always likely to be necessary in relation to the same (see paragraph 49 of the Judgment: "In the case of fire, if there is a threat of imminent destruction or damage, remedial works to prevent that occurring within the policy period would be necessary and most probably necessary immediately"),

> meaning that it could not be said that the Claimant/Respondent had no real prospect of success in relation to the sort of 'passive' fire safety defects alleged in the Proceedings (see paragraph 61 of the Judgment: "Vivid's case on the construction of the policy clause and whether the policy responds has a real prospect of success in relation to all Defects other than Defect 4").
>
> 2. The Learned Judge should properly have held that the words used in clause 3(a)(iii), including "imminent" and "immediate remedial works" in particular, were to be interpreted and applied in line with their normal and ordinary meanings, such that there was required to be a threat of destruction or physical damage which (i) was both likely to happen and likely to happen sufficiently soon; and (ii) required remedial measures to be carried out to prevent such destruction or physical damage before the end of the Period of Insurance. Had the proper meanings of these words been applied correctly to the sort of fire safety defects which were alleged by the Claimant in the present case, the Defendant/Appellant would have been entitled to summary judgment pursuant to CPR 24.3 in relation to all such defects on the basis that the Claimant's case stood no real prospect of success."

14. Allianz's central complaint is that the Judge construed clause 3(a)(iii) in such a way as failed to give the word "imminent" any or any effective meaning. Expressed slightly differently, Allianz submits that the Judge gave either no or insufficient weight to the words "imminent" and "immediate" in clause 3(a)(iii).

The Respondent's Notice

15. Vivid served a Respondent's Notice by which, as well as supporting the reasons given in the Judgment, it proposed two additional formulations, namely:

> "1. Clause 3(a)(iii) of the Policy provides cover for a "Defect" that causes the "threat of imminent destruction or physical damage". On a proper construction of clause 3(a)(iii), cover is engaged where there are facts that would lead a reasonable observer to conclude that there was a realistic prospect (i.e. one that is more than merely fanciful) of destruction or physical damage occurring within the Period of Insurance. The Claimant/Respondent has a real prospect of establishing at trial that such facts were present here.
>
> 2. Alternatively, on a proper construction, cover under clause 3(a)(iii) of the Policy is engaged where there are facts leading a reasonable observer to conclude that there was a serious risk amounting to a real likelihood that destruction or physical damage would occur within the Period of Insurance. The Claimant/Respondent has a real prospect of establishing at trial that such facts were present here."

Discussion and resolution

16. The longer the hearing of this appeal lasted, the less there appeared to be between the parties. Allianz submits that "imminent" should be given its normal and ordinary meaning, which it submits was articulated by Christopher Clarke J at [55] of *Gerling*: see [8] above. The Judge adopted Christopher Clarke J's formulation at [J29]. That formulation expressly recognises that whether the damage in question is sufficiently likely to happen sufficiently soon is a question of fact and degree. It is not reasonably arguable that the Judge failed to adopt the *Gerling* formulation.

17. Allianz also submits that adopting that interpretation meant that the threat of destruction or physical damage must be "both likely to happen and likely to happen sufficiently soon." That is precisely the test that the Judge adopted at [J40]: "In my judgment, to answer the question of whether there is a threat of such imminent damage or destruction involves asking whether in August 2019 the risk of fire was *sufficiently serious* and would eventuate *sufficiently soon*."

18. That was the question, including the likelihood of an occurrence eventuating and the temporal element of eventuating sufficiently soon, that the Judge answered at [J44]. She concluded that there was a prospect (sufficient to defeat Allianz's claim for summary judgment) that a reasonable observer in August 2019 would form the view that "there was a *serious risk* of fire and the consequent threat of destruction or damage *sufficiently soon*." While it is correct that the insured peril was not the threat of fire but the threat of imminent destruction or physical damage to the premises caused by a Defect, her answer was given in the context of her (correct) formulation of the relevant question. It was an answer and a finding that she was entitled to make for the reasons she gave and it cannot be overturned on this appeal.

19. It is accepted (and I would hold it to be clear from [J44] and elsewhere) that the Judge had well in mind the principles applicable to a claim for summary judgment. While she touched on various issues raised by each of the parties at [J40]-[J43], and made observations on some of them, she was astute not to express a concluded view on the ultimate outcome when all matters of fact and degree were brought into account. She 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. As things stand, the only evidence that Vivid has been able to accumulate on the risk of a fire in the building in addition to the CBRE report is a schedule of fires occurring in Vivid's properties, which Vivid says it would wish to amplify were the matter to go to trial. That is not a surprising submission, given that the schedule contains an entry (not relating to Collins Place) where the fire is said to have started in a fridge freezer in the kitchen of the property.

20. I would not criticise the Judge for pointing out that "on one view" Mr Thompson's submissions would seem to take away or omit any consideration of whether the threat of destruction or damage is likely to occur sufficiently soon. But she did not adopt that view and, for the reasons she gave, she was entitled to reach the position on imminence that she did.

21. Allianz also criticises the Judge's approach to the need for urgent remedial works. Once again, the Judge was astute not to express a concluded view: see [J48]-[J49], cited at

[11] above. In my judgment that was an approach that the Judge was entitled and right to adopt in the context of an application for summary judgment. When assessing the matters of fact and degree that are to be brought into account, there is an obvious relationship between the severity of the risk and the urgency of proposed remedial repairs. I agree that the terms of Vivid's notification to Allianz are not determinative. Much more informative, to my mind, is the prioritisation of compartmentation defects by CBRE: see [7] above. It is at least a tenable submission that adopting a waking watch is a remedial step, given that it reduces the risk of spread of fire; and this Court has not been directed to any evidence about the steps taken by Vivid to implement other remedial works or the reasons explaining the timeframe for their implementation. These are all, in my judgment, paradigm matters for resolution at a trial, not on a summary judgment application.

22. Because of the view I take on Allianz's challenge, it is not necessary to express a view on the matters raised by Vivid's Respondent's Notice and I do not do so.

Conclusion

23. For the reasons set out above I would dismiss this appeal.

Lord Justice Phillips

24. I agree.

Lord Justice Peter Jackson

25. I also agree.