

IN THE COURT OF APPEAL (CIVIL DIVISION)

Appeal No. CA-2026-000940

On appeal from:

HIGH COURT OF JUSTICE

Claim No. HT-2023-000476

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT (KBD)

(The Honourable Mrs Justice Jefford DBE)

BETWEEN:

VIVID HOUSING LIMITED

Claimant / Respondent

- and -

ALLIANZ GLOBAL CORPORATE & SPECIALITY SE

Defendant / Appellant

**RESPONDENT'S REPLACEMENT
APPEAL SKELETON ARGUMENT DATED**

28 AUGUST 2026

References: in the form [CB/Tab/page] and [SB/Tab/page] are to the Core Bundle and the Supplementary Bundle respectively.

A. Introduction

1. This skeleton argument is filed on behalf of the Claimant / Respondent, Vivid Housing Limited (“**Vivid**”) in opposition to the appeal made by Allianz Global Corporate & Specialty SE (“**Allianz**”).
2. Allianz seeks to appeal against the Order of Mrs Justice Jefford DBE (the “**Learned Judge**”) dated 16 December 2025 [CB/6/75-77] and her judgment dated 18 December 2025 [CB/7/78-91] (the “**Judgment**”) pursuant to which Allianz’s application for summary judgment was dismissed on all but one of Vivid’s claims. Permission to appeal was granted by the Learned Judge on 27 March 2026 (see the Learned Judge’s

Reasons at [CB/8/92-94]).

3. Allianz's appeal should be dismissed for the reasons set out below.

B. Background

4. Vivid is a Housing Association and the freehold owner of a block flats at Collins Place, 189 Victoria Road North, Portsmouth, Hampshire PO5 1AE (the "**Premises**").
5. The Premises contain 72 flats, spread over 9 storeys, with around 150 occupants in total (the precise number not presently being known). The building is over 18m high (c. 22.4m from the ground to the top floor). Each of the 72 flats is let to social housing tenants.
6. Vivid has spent c. £5.21m in remediating the Premises following discovery of various defects at the Premises. These Defects are summarised at Judgment/5 [CB/7/80]. In pursuing its only avenue of recovery, under the Policy Vivid claims c. £4.2m.
7. Vivid began its claim via Claim Form dated 22 December 2023 [CB/11/102-106]. Particulars of Claim, including a Scott Schedule particularising its case on the Defects, were served on 17 April 2024 [CB/11/107-121].
8. Allianz filed its Defence on 12 June 2024 [CB/12/122-131]. Allianz did not engage with the substance of Vivid's case on the Defects or respond to the Scott Schedule, denying any cover under the Policy at all. Vivid filed its Reply on 30 July 2024 [CB/13/132-137].
9. Allianz then applied for summary judgment on the whole of Vivid's claim by Application Notice dated 14 January 2025 [SB/2/8-12]. Allianz's initial grounds for summary judgment included that Vivid had no real prospect of successfully establishing that:
 - (a) Defects 2, 3 and 5 were defects in the Structural Works within the meaning of the Policy;
 - (b) there was no cover available in respect of defects connected with fire safety because such cover was only available under a Health & Safety extension that

had not been taken out, by reference to whose terms Allianz sought to construe the Policy; and

- (c) the claim in respect of the Defects was caught by Exclusion 4(a)(iv) in the Policy.

10. In Leading Counsel for Allianz's skeleton argument for the summary judgment hearing, Allianz withdrew its case that Defects 2, 3 and 5 were not defects in the Structural Works and asked the Court to determine the case on the assumption that they were (paragraph 9 [SB/7/190]). This was because Vivid's position was that any detailed analysis of whether Defects 2, 3 and 5 were Defects in the Structural Works would require technical evidence on the nature, scope and extent of these Defects and was unsuitable for summary judgment.
11. Further, at the hearing of the summary judgment application, Leading Counsel for Allianz confirmed that it no longer relied upon:
 - (a) the terms of the Health & Safety extension as an aid to construction of the Policy, confining its reliance upon it to it being part of the factual matrix of the Policy; and
 - (b) Exclusion 4(a)(iv) as: (i) excluding cover for the Defects, or (ii) material to the construction of clause 3 of the Policy (see Judgment/paragraph 6 [CB/7/81]).
12. In her 16 December 2025 Order [CB/6/75-77], and the Judgment [CB/7/78-91], the Learned Judge refused summary judgment on all Defect 4. On 27 March 2026, the Learned Judge granted Allianz permission to appeal [CB/9/95-98 and CB/10/99-101].
13. As can be seen from the Learned Judge's Reasons and Allianz's Skeleton Argument, it now attempts to advance arguments that row back from all three of the points that were conceded above. This change in position does not assist Allianz, whose appeal should be dismissed, for the reasons set out below.
14. References below to:
 - (a) Allianz's Skeleton Argument are made as [Skeleton Argument/paragraph]; and
 - (b) witness statements filed in relation to the summary judgment application as

[Witness Initials + Statement Number/paragraph].¹

C. Key Policy Terms

15. The initial beneficiary of the Policy was Fleming Developments UK Limited (“**FDL**”). The benefit of the Policy transferred to Vivid upon it becoming freeholder of the Premises.
16. The Period of Insurance of the Policy ran for 12 years from the Date of Inception. The Date of Inception was specified by the Endorsement (at [**CB/14/162**]) to be 22 May 2008. Accordingly, the Policy ran from 22 May 2008 until 21 May 2020.
17. The Operative Clause in the Policy is clause 3(a), which provides [**CB/14/146**]:

“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.”

18. The Policy included the following defined terms [**CB/14/144-145**]:

(a) Defect:

“Any defect in the Structural Works notified to the Insurers during the Period of Insurance which is attributable to a defect in design workmanship or materials which was not manifest at the Date of Inception.”

¹ [AC1] referring to Ms Abigail Condry’s witness statement on behalf of Vivid and [TR1] referring to Mr Tobias Rogers’ witness statement on behalf of Allianz.

(b) Structural Works:

- *“All internal and external load-bearing structures essential to the stability, strength or weatherproof integrity of the Premises; and*
- *drains, internal walls and windows, plaster, ceilings, staircases, internal floor decking and screeds, chimneys and flues...”*

19. Section 4 of the Policy, “*POLICY EXCLUSIONS*”, contains the following [CB/14/148]:

“(a) This Policy does not cover any destruction, physical damage or threat of imminent destruction or physical damage caused by, arising from, or consequent upon:

...

(iv) fire, lightning, explosion, earthquake, storm, tempest, flood, frost, bursting or overflowing of water tanks, pipes or other apparatus, water discharged or leaking from an automatic sprinkler installation, pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds, the impact of aircraft or other aerial devices or articles dropped or falling therefrom or the impact of any other vehicle whether licensed or not;”

D. Respondent’s Notice / Vivid’s interpretation

20. By a Respondent’s Notice dated 1 May 2026, Vivid sought to uphold the Learned Judge’s 16 December 2025 Order for the reasons given in her Judgment, as well as on the following additional grounds [CB/3/39-49]:

“1.1. 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]². The Claimant/Respondent has a real prospect of establishing at trial that such facts were present here.

1.2. 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]³. The Claimant/Respondent has a real prospect of establishing at trial that such facts were present here.”

D.1 Primary case: realistic prospect

21. At Judgment/20 [CB/7/83], the Learned Judge concluded that there is “*no magic in the word “threat”*”, which had been used in the same way as the word risk or danger might be used in other policies.
22. In Vivid’s respectful submission, the Judge was wrong to equate the use of the word “*threat*” with words such as ‘risk’ or ‘danger’ as used in other policies.
23. The words the “*threat of*” are inchoate words that convey a looser connection between the damage and the likelihood of it occurring imminently than would be required if it was necessary to show imminent damage or an imminent danger: the form of wording considered by previous authorities.
 - (a) In *Gerling General Insurance Co and others v Canary Wharf Group plc* [2005] EWHC 2234 (Comm); [2006] 1 Lloyd’s Rep 68, the relevant insuring words were quoted at [7], namely, “*actual or imminent loss or damage*”.
 - (b) In *Zagora Management Ltd v Zurich Insurance Plc* [2019] EWHC 257 (TCC); 182 Con. L.R. 180, the relevant insuring words were quoted at [7.1.21], namely, “*a present or imminent danger*”.
24. The “*threat of*” is one step removed from there being imminent damage or there being imminent danger: there is merely a threat that it is imminent. The “*threat of*” imminent

² Referred to as the Policy Period within the Respondent’s Notice.

³ Referred to as the Policy Period within the Respondent’s Notice.

damage is imminent damage that is not yet fully formed, i.e. not being a serious risk amounting to a real likelihood yet.

25. The words “*threat of*” require facts that would lead a reasonable observer to conclude that there was a realistic prospect of physical damage occurring (i.e. one that was more than merely fanciful). For the reasons given by the Learned Judge at Judgment/40-46 [CB/7/87-88], that test is made out here.

D.2 Secondary case: serious risk

26. In the alternative, and if the words “*threat of*” do not have the effect that Vivid contends for in Section D.1 above, namely, of requiring only a realistic prospect of physical damage occurring, Vivid submits that the formulation used by Christopher Clarke J in *Gerling* at [58] of an imminent occurrence being where there is “*A serious risk, amounting to a real likelihood*” of its eventuating, should be adopted. For the reasons given by the Learned Judge at Judgment/40-46 [CB/7/87-88], that test is made out here.

D.3 Period of Insurance

27. Whether or not the words “*threat of*” have the effect that Vivid contends for in Sections D.1 or D.2 above, in its submission clause 3(a)(iii) is met where the reasonable observer would conclude that the relevant damage might occur in the Period of Insurance.
28. It is common ground that the Period of Insurance ran for 12 years from the Date of Inception.
29. What, if any, temporal connection the word ‘imminence’ conveys may differ from policy to policy. In each case, the context of the relevant policy must be considered. In *Gerling* at [55], Christopher Clarke J made this same point, noting that:

“...The question has, also, to be considered in light of the structure and provisions of the Policy to which I have referred”

30. In the case of the Policy under consideration here, which in broad summary provides cover for latent defects for a period of 12 years, the benchmark for whether there is a threat of imminent damage must be whether such damage might or could eventuate at some point within the Period of Insurance (whether that be a realistic prospect of it

doing so or a serious risk amounting to a real likelihood). On a proper construction of clause 3(a)(iii), there is no additional requirement that the damage be likely to happen ‘sufficiently soon’ within the Period of Insurance (i.e. no requirement for there to be a realistic prospect or serious risk of it happening any earlier than during the Period of Insurance).

31. On this analysis, and whether by virtue of the words the “*threat of*” and/or “*imminent*” being construed in the context of the Policy, the interpretation of clause 3(a)(iii) outlined above means that if it can be said in year 1 of the Policy that there is a serious risk or realistic prospect of damage occurring as a result of a Defect in years 6-8 of the Period of Insurance, there is no artificial requirement for the parties to wait until say, 5.75 years into the Period of Insurance before the insured is entitled to an indemnity in this connection. This interpretation enables both the insured and the insurer to ensure that they obtain the benefit of clause 3(a)(iii) by implementing works to remove a threat of imminent damage before it eventuates and requires more costly remedial works, rather than turning it into a race to make a claim and receive the benefit of clause 3(a)(iii) at the eleventh hour.
32. Equally, where there is a constant risk of fire in a multi-occupancy, high-rise, residential building containing social housing which may occur by a broad range of causes which eventuate frequently, such that it can be said that there is a realistic prospect or serious risk of a fire occurring and a Defect causing damage within the Period of Insurance, then that is sufficient to meet clause 3(a)(iii) and the requirement that there be a threat of imminent damage.
33. The remainder of Vivid’s Skeleton Argument is without derogation from its case as set out above on the proper construction of clause 3(a)(iii).

E. Allianz’s Grounds of Appeal

34. Below, Vivid addresses each of the Sub-Issues raised by Allianz in its Skeleton Argument. Vivid does not always adopt the titles given to these Sub-Issues by Allianz but has sought to make it clear which Sub-Issues identified by Allianz are being addressed.

E.1 Sub-Issues 1 and 2: “Imminent” and “Commercial Construction”

35. Under Sub-Issues 1 and 2, Allianz appears to make three core criticisms of the Learned Judge’s approach to interpretation of clause 3(a)(iii).

- (a) **First**, the Learned Judge’s interpretation of clause 3(a)(iii) removed or rendered nugatory any requirement for the threat of damage or destruction to be “*imminent*”, i.e. for it to be likely to occur sufficiently soon.
- (b) **Second**, the Learned Judge’s interpretation elevated considerations of commerciality above the natural and ordinary meaning of the words used in clause 3(a)(iii).
- (c) **Third**, the Learned Judge’s interpretation involves an assumption that there must be cover for all “*Defects*” and especially those concerned with fire safety.

36. Each of Allianz’s criticisms is unwarranted and wrong. Vivid addresses the three points identified in paragraph 35 above in turn below.

E.1.1 Imminence remains a substantive requirement

37. In Appeal Skeleton Argument/paragraph 38 [CB/2/27], Allianz says:

“Accordingly, by holding that “there is always a threat of imminent damage or destruction by fire” in [Judgment/43], the Learned Judge wrongly removed (or rendered nugatory) the requirement in clause 3(a)(iii) of the Policy for such damage or destruction to be “imminent”. The Learned Judge recognised this consequence herself, saying (also at [Judgment/43]): “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.” This is indeed the effect of the Learned Judge’s decision and Allianz says it was wrong in law as a result.”

38. This is a mischaracterisation of the Judgment and its effect.

39. **First**, and even on Allianz’s interpretation, the Learned Judge’s construction of the Policy did not remove or render nugatory the requirement for damage or destruction to be imminent in all cases.

40. Allianz’s objection relates to the Judge’s application of the Policy to the specific

Defects in issue in these proceedings: Defects which concern fire safety. However, the Learned Judge's construction of the Policy in relation to other Defects aligns with Allianz's approach. The Learned Judge even granted summary judgment on Defect 4, which relates to inadequate support provided by overstressed cladding bracketry and the consequent risk of the bracketry and/or panels detaching (Judgment/57-59 [CB/7/90]).

41. Further, after determining that Vivid had a real prospect of establishing that the reasonable observer in August 2019 would have formed the view that there was a serious risk of fire and the consequent threat of destruction or damage sufficiently soon, the Judge said at Judgment/45-46 [CB/7/88]:

“45. I observe 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. A more obvious example, where the policy is less difficult to construe, is a structural defect that will reduce load bearing capacity over time. At the point it becomes manifest, there may be a threat of destruction or physical damage in the future but not of imminent destruction or physical damage. Whether the threat of imminent destruction or damage might be established by calculation or investigation or if, for example, the structure might be affected by high winds, evidence of the likelihood of high winds. But the risk of fire may be said to be constant.

46. That answers Allianz's submission that Vivid's construction of the policy leads to the conclusion that there would be cover for any defect if there was some risk of destruction or damage. It does not in relation to many types of defect within the meaning of Defect in the policy.”

42. Vivid does not understand Allianz to object to the Learned Judge's interpretation of the word “*imminent*” insofar as concerns other Defects, such as the hypothetical structural defect considered in Judgment 45/46 [CB/7/88] (albeit Vivid does not accept the Learned Judge's example applies the Policy correctly, for the reasons given in Section D above).
43. **Second**, even in relation to Defects which concern fire safety, the Learned Judge's

decision did not remove or render nugatory the requirement in clause 3(a)(iii) of the Policy for damage or destruction to be imminent.

44. In fact, what the Learned Judge accepted was that on the facts of this case, which relate to a multi-occupancy, high-rise, residential building containing social housing, Vivid had a real prospect of establishing that damage or destruction was imminent. In particular, the Learned Judge concluded that the evidence adduced by Vivid demonstrated that: “*the threat of fire is constant and the schedule of fires is indicative of the frequency of occurrence and the variety of causes*” (Judgment/43 [CB/7/88]).
45. In that case, as the Learned Judge said, “*there is always a threat of imminent damage or destruction by fire*” (Judgment/43 [CB/7/88]). In other words, there is a sufficiently serious threat that fire will occur and that the Defects will cause damage that would not otherwise occur, (on the Learned Judge’s analysis) sufficiently soon⁴. That interpretation does not render nugatory or remove the requirement for imminence: it applies it in the context of the claims made in these proceedings and the evidence available for consideration upon summary determination.
46. For the same reasons, it does not prevent the word ‘imminent’ from performing any limiting role in clause 3(a)(iii). However, it should not be assumed that clause 3(a)(iii) and the cover for the threat of imminent damage is directed solely to limiting insurers’ exposure. In fact, clause 3(a)(iii) is of benefit to insurers, in that it enables them to implement a more conservative scheme of remedial works than may be required once damage has eventuated.
47. Allianz places considerable reliance on the fact that the Learned Judge went on to say that: “*I recognise that, on one view, [this analysis] would seem to take away or omit any consideration of whether the threat of destruction or damage is likely to occur sufficiently soon*” (Judgment/43 [CB/7/88]). Allianz’s attempt to take advantage of this balanced remark from the Learned Judge should be dismissed.
48. **First**, the competing view that was referred to by the Learned Judge was not one that

⁴ As set out above, Vivid’s position is that imminence is to be determined by what may happen within the Period of Insurance.

she appears to have shared.

49. **Second**, and as the Learned Judge went on to observe at Judgment/45 [CB/7/88], her conclusion was that on the facts before her Vivid had a real prospect of establishing that the risk of damage from the Defects in issue in this case was sufficiently likely to occur sufficiently soon for clause 3(a)(iii) to be met (see paragraph 41 above).
50. **Third**, the substance of the point that the Learned Judge was making was to draw a distinction between a fire and damage being a virtual certainty (i.e. a fire about to break out or having already broken out) and there being a serious risk amounting to a real likelihood of the same. It was for that reason that the Judge went on to reject Allianz's interpretation, the effect of which is that for cover to be engaged: "...*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*" (Judgment/43 [CB/7/88]; see also Judgment/41 [CB/7/87]).
51. What the Learned Judge was rightly saying, was that imminence does not require a fire to be about to break out: a constant risk of fire that could happen by a variety of (frequent) causes is enough for a reasonable observer to conclude that there is a sufficiently serious risk that damage or destruction as a result of the Defects may happen (on the Learned Judge's analysis) sufficiently soon to be regarded as imminent.
52. The Judge's analysis not only applies the words of the Policy, it is supported by *Gerling* at [58], where Christopher Clarke J said as follows:

"58. That conclusion renders it unnecessary to decide whether, if on the facts available at the relevant time, damage would appear to the reasonable observer a virtual certainty (and therefore, prima facie "imminent"), nevertheless the damage falls to be treated as not being "imminent" within the meaning of the policy if, as a result of facts subsequently discovered, it is apparent that the relevant damage would not or was unlikely to occur. I incline to the view that the answer to that question is in the negative, because the fair interpretation of the provision, having regard to its purpose or [sic] minimising insurers' exposure, is that the insured should recover in respect of any additional cost of working which, at the time that the insured incurred it, was necessary to avert

a peril which, on the then indications, was imminent. In any event I do not think that the question arises on the facts. If TC7 and TC8 had been constructed in the same manner as TC3, it seems to me that the likelihood of their collapse during the course of such construction was sufficiently grave to make that collapse imminent at some stage - probably towards the end of the construction. I do not think that, in this context, the collapse had to be virtually certain in order to be classified as imminent. A serious risk, amounting to a real likelihood, is sufficient.” (Emphasis added)

E.1.2 Commerciality

53. When the Learned Judge said at Judgment/43 [CB/7/88] that Allianz’s construction of the Policy was uncommercial, the Learned Judge did not elevate commerciality above the primacy of the words used or undervalue their natural and ordinary meaning.
54. Rather, the Learned Judge was pointing out that the consequence of Allianz’s interpretation would undermine the cover provided by the Policy, in that if a fire had to be about to break out or to have already broken out for damage to be considered imminent, the benefit of the cover provided might never be received by the insured (and the benefit of clause 3(a)(iii) might never be obtained by Allianz).
55. Allianz’s approach is both impermissible as a matter of interpretation and uncommercial, and the Learned Judge was right to make the observation that she did. In that connection:
 - (a) Allianz’s position was and is that that the Policy can respond to certain defects concerned with fire safety but (Skeleton Argument/paragraph 36 [CB/2/27]):

“Such defects can only be considered to cause (or contribute to) damage or destruction where a fire has actually started and so such damage or destruction can only be considered “imminent” (both within the normal and ordinary usage of that term and as per the test formulated by Christopher Clarke J in Gerling) where such fire is likely to break out soon...”
 - (b) Allianz did not at first instance and has not here attempted to articulate in what circumstances it could be said that a fire is likely to break out sufficiently soon for the Policy to bite and there still to be any time for a policyholder to claim

and receive the benefit of the Policy before damage occurs. The threat of imminent damage against which the Policy protects would eventuate before any indemnity could be received and/or any rectification work implemented.

- (c) As such, the effect of Allianz's interpretation is to undermine the purpose of the cover which the Policy provides. Such an interpretation renders the cover illusory and unwarrantably diminishes the indemnity which it was the purpose of the Policy to afford. This is not a permissible approach to the interpretation of the Policy (see *Cornish v The Accident Insurance Company* (1889) QBD Volume xxiii page 453 at page 456).

56. If Allianz's interpretation is correct, it would be close to impossible for a policy holder who was not also in actual occupation (i.e. presently inhabiting) and in the right place at the right time within the premises, to obtain the benefit of the cover before it was too late. By the same token, it would be close to impossible for the insurer to obtain the benefit of clause 3(a)(iii), i.e. the ability to carry out works to prevent damage occurring at lower cost than the works that might be required once damage has occurred. That cover should depend on timing, in the sense of whether an insured had the good fortune to be able to make its claim in time, is wholly unsatisfactory.

E.1.3 No presumption that there must be cover for all "Defects"

57. In Allianz's Skeleton Argument it contends that [CB/2/28]:

"40...the Learned Judge's analysis therefore appears to have proceeded from the false premise that any and every fire safety defect which falls within the definition of "Defect" in the Policy (or at least the alleged defects in the present case, which were assumed for the purposes of the application to fall within that definition) must be covered under the Policy and indeed under every 'limb' in the Policy's "Operative Clause", including clause 3(a)(iii) in particular...

42...that is no reason to 'read out' specific requirements in the insuring provision (i.e. the requirement for damage to be "imminent" in the sense that it is likely to be caused "sufficiently soon") so as to achieve the result that every such "Defect" will always be covered under clause 3(a)(iii).

43. In this respect, the Learned Judge's approach to clause 3(a)(iii) of the

Policy where fire safety defects are concerned would appear to lead to the conclusion that any defect which (i) is concerned with fire safety and (ii) falls within the definition of “Defect” in the Policy will always automatically be covered under clause 3(a)(iii) of the Policy, no matter how serious or trivial the defect in question...”

58. Allianz’s criticisms of the Learned Judge’s analysis are misconceived.
59. In particular, Allianz has not explained anywhere why it is problematic that defects concerned with fire safety falling within the definition of “Defect” in the Policy should on the face of things be covered.
- (a) **First**, it is only a specific subset of defects concerned with fire safety that could constitute a “Defect” within the meaning of the Policy, i.e. those defects which are defects in an internal or external load-bearing structure that is essential to the stability, strength or weatherproof integrity of the Premises: see definition of Structural Works: [CB/14/145]).
- (b) **Second**, it is only those defects concerned with fire safety that qualify as “Defects” within the meaning of the Policy and which meet all other requirements of the Policy that engage cover.
- (c) **Third**, and in that connection, whilst triviality or seriousness is no part of the test under the Policy, if upon consideration of an alleged Defect it was determined to be trivial, it is difficult to see how such a Defect could ever meet the requirement within clause 3(a)(iii) to create a threat of imminent damage or destruction.
60. Of course, any more detailed consideration of the nature, extent and scope of the alleged Defects and their seriousness or triviality did not arise because such consideration would involve technical evidence and would be unsuitable for summary determination (this has always been Vivid’s position: see AC1/paragraph 31 [SB/5/171]). No doubt for those reasons, Allianz conceded (see paragraph 10 above) that Defects 1 to 5 qualified as Defects within the meaning of the Policy.
61. Further and in any event, Allianz’s submission that the Learned Judge proceeded from

the false premise that any and every defect concerned with fire safety which falls within the definition of “*Defect*” in the Policy (or at least the alleged defects in the present case) must be covered, is wrong.

62. The Learned Judge did not proceed from any such premise and nor did her approach to construction of clause 3(a)(iii) read out any of its requirements. By this unwarranted criticism of the Learned Judge’s approach, Allianz attempts to turn its concession for the purposes of the summary judgment application that Defects 1 to 5 were Defects within the meaning of the Policy into a stick to beat the Learned Judge with.
63. Ultimately, the Learned Judge’s approach to interpretation of the Policy and comment that: “*In that case there is always a threat of imminent damage or destruction by fire*” at Judgment/43 [CB/7/88] must be viewed against the background of (i) the assumption Allianz invited the Court to make, namely, that the defects alleged are Defects within the meaning of the Policy, (ii) Allianz’s acceptance that the Policy could in principle respond to defects concerned with fire safety, (iii) the Learned Judge’s assessment that the evidence demonstrated that Vivid had a real prospect of showing that there was a serious risk of fire and damage occurring sufficiently soon, and (iv) the effect of Allianz’s interpretation being to undermine the cover provided by the Policy.
64. Furthermore, and as explained in Section E.1 above, the Learned Judge’s analysis does not read out any part of clause 3(a): it simply applies it to the defects under consideration in these proceedings, which Allianz accepted were Defects within the meaning of the Policy and whose further technical analysis was not suitable for summary judgment.

E.2 Sub-Issue 3: the Limiting Role of “*Imminent*” and “*Immediate*”

65. In paragraph 45 above, Vivid has dealt with Allianz’s case on the alleged limiting purpose of the word ‘imminent’.
66. Below, Vivid addresses Allianz’s case that the Learned Judge’s errors in relation to the word ‘imminent’ led her into error on the requirement that the threat of imminent destruction or damage requires “*immediate remedial measures for the prevention of destruction or physical damage within the Period of Insurance*” (Clause 3(a) [CB/14/146]).

67. For all the reasons given in Section E.1 above, Allianz's submissions are wrong and should be dismissed. Allianz, however, advances two specific arguments:
- (a) **First**, an argument that the requirement for immediate remedial measures was not met because Vivid filled out the 'Latent Defect Claim Form' [SB/9/203-205] against the question of whether urgent repairs are required with "N/A".
 - (b) **Second**, an argument that the Learned Judge wrongly considered the waking watch that Vivid had implemented to be relevant to whether immediate remedial measures were required.
68. For the reasons given by the Learned Judge at Judgment/42 [CB/7/87-88], Allianz's reliance upon the Latent Defect Form is misplaced (see also AC1/61 [SB/5/178]).
69. Further, the Learned Judge was right to point to the waking watch as of relevance in her assessment of whether there was sufficient evidence to conclude that Vivid has a real prospect of establishing that there was a threat of imminent damage or destruction requiring immediate remedial measures. It is clear that the Learned Judge did not treat the presence of a waking watch as a necessary step in her reasoning or view the purpose of a waking watch as primarily concerned with preventing damage or destruction of property (see Judgment/42, 49 and 50 [CB/7/87-89]):

"42... 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..."

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.

50. It is common ground that that is to be judged by the test of the reasonable observer at the time the Defects become manifest. The fact that no remedial works were undertaken immediately may be relied on in evidence as of some relevance but the test is an objective one. In any case, on the facts of this case,

there is evidence that there has been a waking watch. Although the foremost purpose of a waking watch is to protect persons, by creating a means of raising the alarm in the event of fire, it also has the effect of preventing or ameliorating the risk of fire spreading sufficiently to cause destruction or damage thereby delaying the need to carry out the remedial works. It would be a surprising result if the effect of taking these steps was to support the argument that there was no need for immediate remedial works.”

E.3 Sub-Issue 4: clause 4(a)(iv) (Policy Exclusions)

70. Clause 4(a)(iv) of the Policy provides [CB/14/148]:

“(a) This Policy does not cover any destruction, physical damage or imminent destruction or physical damage caused by, arising from, or consequent upon:

...

(iv) fire, lightning, explosion, earthquake, storm, tempest, flood, frost, bursting or overflowing of water tanks, pipes or other apparatus, water discharge or leaking from an automatic sprinkler installation, pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds, the impact of aircraft or other aerial devices or articles dropped or falling therefrom or the impact of any other vehicle whether licensed or not;”

71. In its Skeleton Argument/68 [CB/2/34-35], Allianz writes:

“68. While Allianz did not (and does not) rely on that exclusion directly in its summary judgment application (i.e. Allianz does not contend that any “Defect” which is concerned with fire safety will automatically be excluded from cover under clause 3(a)(iii) of the Policy), its existence in the Policy is or should be of at least some significance in construing clause 3(a)(iii) of the Policy; that is, it would be extremely odd if a Policy which excluded all cover where “fire” was the (or a) proximate cause of loss nevertheless provided cover for each and every “Defect” which was in any way concerned with fire safety on the basis that the risk of damage or destruction by fire was always imminent and always required immediate remedial measures to be taken”.

72. At paragraph 13/footnote 21 of Leading Counsel for Allianz’s skeleton argument for the first instance hearing, it was said that “*For the purposes of this Summary Judgment Application, Allianz does not rely on its argument set out in Defence/21.5*” [SB/7/191]. In Defence/21.5, Allianz pleaded that Vivid was not entitled to an indemnity because of the operation of clause 4(a)(iv) [CB/12/127-128]. Allianz continues not to rely upon clause 4(a)(iv) as excluding Vivid’s claims.

73. Further, as recorded in Judgment/6 [CB/7/81]:

“6... It is convenient to note at this point also that, in its Defence, Allianz relied on clause 4(a)(iv) (Policy Exclusions) which, on its face, excluded cover for the threat of imminent destruction or physical damage arising from or consequent on 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”

74. Furthermore, Allianz had by TR1/47 [SB/3/24] conceded that the effect of clause 4(a)(iv) was that Allianz would not pay the costs of damage or the threat of imminent damage that arise from a fire that has actually occurred, except to the extent that the physical damage or threat of imminent damage was caused or contributed to by a Defect that otherwise falls within cover. Allianz does not expressly row-back from this position either.

75. Nonetheless, Allianz’s present reliance on clause 4(a)(iv) for the purpose of demonstrating what clause 3(a)(iii) requires by way of imminence, is inconsistent with the position that Allianz adopted at first instance.

76. Overall, Allianz’s stance now appears to be that:

- (a) some defects concerned with fire safety fall within the scope of cover (i.e. Allianz accepts that a threat of imminent damage by fire is covered, it merely argues over the precise temporal requirement of ‘imminence’);
- (b) clause 4(a)(iv) does not have the effect that all defects concerned with fire safety are excluded;
- (c) clause 4(a)(iv) does not apply so as to exclude from cover Defects 1, 2, 3 or 5;

but

- (d) clause 4(a)(iv) is nonetheless relevant to the construction of clause 3(a)(iii) of the Policy because it indicates that not every Defect concerned with fire safety will always be covered.

- 77. Allianz's stance is somewhat difficult to follow. On a proper construction of clause 4(a)(iv) it makes clear that there is no cover for destruction, damage or imminent destruction or damage that arises solely from a random or uncontrollable event such as fire, earthquake, aerial devices travelling at sonic or supersonic speeds, articles dropped therefrom etc.
- 78. Further, it appears to be common ground – and the consequence of Allianz's position as summarised at paragraph 76 above – that where there is a fire, clause 4(a)(iv) does not exclude from cover damage or destruction or the threat of imminent damage or destruction that would not have arisen in the absence of the Defect (e.g. such as where the Defect: “[contributes] to a fire which has started independently growing and/or spreading further or faster than might otherwise be the case”: Skeleton Argument/12 [CB/2/20]).
- 79. In the premises, clause 4(a)(iv) does not indicate that the Learned Judge's construction of clause 3(a)(iii) is wrong because, for the reasons set out above, its application is limited and it does not affect Vivid's claim.

E.4 Sub-Issue 5: Allianz's Concessions

- 80. At Skeleton Argument/75 [CB/2/36], Allianz refers to the Learned Judge's reasons for granting permission to appeal, in which it was pointed out that the basis for Allianz's application for permission to appeal included that the Learned Judge's construction of clause 3(a)(iii) was wrong when the Policy was considered as a whole, particularly in light of the fire safety exclusion, and the Health & Safety extension.
- 81. What the Learned Judge was saying is that Allianz appeared on its application for permission to appeal to be trying to revive arguments that it had conceded as a means of demonstrating that the Learned Judge's construction of clause 3(a)(iii) was wrong. The Learned Judge was right to make this observation.

82. At Skeleton Argument/76 [CB/2/36-37], Allianz writes:

“As explained above, none of Allianz’s assumptions (or concessions) should properly have led the Court to adopt a construction of clause 3(a)(iii) which was based on a purported “commercial construction” of clause 3(a)(iii) that could not (and cannot) be justified either by the wording of clause 3(a)(iii) itself or by the terms of the Policy more broadly (including the “fire” exclusion, for example)”

83. As addressed in Sections E.1 to E.3 above, the Learned Judge adopted a proper construction of clause 3(a)(iii) that is justified by the wording of clause 3(a)(iii) and the terms of the Policy. For the same reasons, Allianz’s complaint goes nowhere.

84. Further, at Skeleton Argument 73/74 [CB/2/36] Allianz attempts to rely upon the Health & Safety Extension as *“part of the commercial context which the Court should have taken into account when construing the Policy”*. The implication of Allianz’s position is that had the Health & Safety Extension been taken into account, this would have altered the Learned Judge’s analysis. This is wrong.

85. The Learned Judge did take into account the Health & Safety Extension as part of the commercial context and was correct to accord it little weight, for the reasons the Learned Judge gave: see Judgment/52-56 [CB/7/89-90].

86. Nonetheless, Allianz now appears to be attempting to construe the Policy by reference to the Health & Safety Extension: see the comparison at Skeleton Argument/74 [CB/2/36] (and the suggestion that it is under this Extension that any claim should have been made). That approach is impermissible for the following reasons.

(a) **First**, unlike cases involving deletions, there is no basis for looking at the physically separate Health & Safety extension, as there has been no deletion to text within the same physical document as the remaining terms of the concluded contract (see *Mopani Copper Mines v Millennium Underwriting* [2008] EWHC 1331 (Comm); [2008] 2 All ER (Comm) 976 at [120]-[121]). Rather, this is a case where an extension, the terms of which do not appear in the Policy, was not selected.

- (b) **Second**, there is no ambiguity in the words of the Policy that requires recourse to be had to the Health & Safety extension. Even where a deletion is physically contained within a concluded contract, it is only permissible to consider that deletion where the retained wording is ambiguous and requires clarification by reference to the deletion (see *Narandas-Girdhar v Bradstock* [2016] EWCA Civ 88; [2016] 1 WLR 2366 at [20]). The Policy wording is not ambiguous and nor does Allianz assert so. Even if it was ambiguous, using this text as an aid to construction would still have to be done with care.
 - (c) **Third**, to construe the Policy by reference to or in the context of the words of the Health & Safety extension would be contrary to the principle that it is only facts or circumstances known or reasonably available to both parties at the time of contracting, which may be considered as part of the factual matrix (see *Arnold v Britton* [2015] A.C. 1619 at [21]). Allianz does not allege that the Health & Safety extension wording was ever sent to FDL (the initial beneficiary of the Policy).
 - (d) **Fourth**, the very approach that Allianz takes to interpretation of the Policy, was rejected in *Ted Baker Plc v Axa Insurance UK Ltd* [2012] EWHC 1406 (Comm); [2013] 1 All E.R. (Comm) 129 at [84], in particular.
87. Vivid accepts that the Health & Safety extension was not selected when entering into the Policy. That is an admissible background fact, but it goes no further than that. As in *Ted Baker v Axa*, there may have been many reasons why the Health & Safety extension was not selected by FDL (see AC1/14 [SB/5/165]). If that was a relevant matter, factual evidence would be required to address it, which would not be appropriate in this application for summary judgment
88. Allianz's attempt to exclude cover for Vivid's claim under the Policy by implication based on the wording of the physically separate Health & Safety extension that is not even alleged to have been sent to FDL, should be rejected.
89. The words of the Policy must be construed in the ordinary way.

F. Conclusion and Order Sought

90. For the reasons set out above, Vivid respectfully requests the Court of Appeal to dismiss Allianz's Ground of Appeal and to uphold the Learned Judge's determination that Allianz is not entitled to summary judgment on Defects 1, 2, 3 and 5.
91. Vivid also seeks an order that Allianz pay its costs of the appeal (although recognises that the appeal itself is not the appropriate forum in which to debate such points).

CHARLIE THOMPSON

COURTNEY BURRELL-EADE

Keating Chambers

15 Essex Street

London

WC2R 3AA

Counsel for the Respondent

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