



Assessing Overlap Between Adjudicators' Decisions: Guidance from the Court of Appeal

In *Sudlows Ltd v Global Switch Estates 1 Ltd* [2023] EWCA Civ 813, the Court of Appeal (“**CoA**”) considered the overlap between adjudication decisions in allowing an appeal against a TCC decision covered in one of our previous bulletins: https://hklegal.co.uk/case_bulletin/sudlows-ltd-v-global-switch-estates-1-limited-2022/

Background

Global engaged Sudlows under a JCT Design and Build Contract to undertake fit-out and enabling works (the “**Works**”) for an electricity substation at East India Docks House, London (the “**Site**”).

Following damage to cabling, replacement cables were pulled through by another contractor but Sudlows refused to terminate, connect, and energise those cables, causing delays. The Works were finally completed in August 2021 (not February 2018 as originally envisaged).

Several adjudications were contested by the parties.

Adjudication 5

Adjudication 5 concerned Sudlows' claim for an extension of time (“**EOT**”) of 509 days. There was no dispute that the delay was caused by cabling/ductwork issues. The only issue was which party was contractually responsible for those works.

Provision of ductwork was Global's responsibility whereas installation of cabling through ductwork was Sudlows' responsibility. Sudlows argued the ductwork was defective but Global maintained it was Sudlows' cabling installation that was inadequate.

The adjudicator (“**Mr Curtis**”) concluded that Global's defective duct network was the reason for delays up to 18 January 2021. Mr Curtis decided Sudlows was entitled to an EOT of 482 days to 8 December 2020.

Adjudication 6

In Adjudication 6, Sudlows sought a further EOT from 19 January 2021 for a period of 133 days, together with additional payments, including loss and expense. Sudlows relied on the same Relevant Event in Adjudication 5, in effect contending that this was a continuation of the delays assessed in Adjudication 5. In Adjudication 6, Global sought to rely upon two new reports to support its position that nothing was wrong with the ductwork.

By a decision of 9 September 2022, the adjudicator (“**Mr Molloy**”) confirmed he was bound by Mr Curtis' Decision. Mr Molloy therefore granted Sudlows the 133-day EOT sought and awarded it the sum of c.£996k (the “**Primary Decision**”).

In an unusual move, Mr Molloy nevertheless added that if he was wrong to have considered himself bound by Mr Curtis' Decision, he would have found that the probable cause of cabling failure was Sudlows' responsibility, such that he would not grant Sudlows a 133-day EOT; conversely, would allow Global's claims for liquidated damages; and would find a sum of c.£209k due *from* Sudlows *to* Global (the “**Alternative Decision**”).

Global declined to pay and Sudlows applied for summary judgment to enforce the Primary Decision. Global initiated Part 8 proceedings alleging a breach of natural justice, rendering the Primary Decision unenforceable, but contending that the Alternative Decision was enforceable in place of the Primary Decision.

First Instance Decision

The TCC found that Mr Molloy was wrong to have concluded that he was bound by Mr Curtis' Decision,

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as the dispute referred to Mr Molloy was not the same or substantially the same as that in Adjudication 5:

- Relying on the same Relevant Event did not determine whether the disputes were the same or substantially the same.
- The EOTs were for *different* periods of time.
- Adjudication 6 involved novel materials and reports (which were not part of Adjudication 5).
- Adjudication 5 focussed on Sudlows' entitlement to an EOT, whereas Adjudication 6 encompassed wide-ranging issues as to the value of the Works.

Consequently, there had been a breach of natural justice, rendering the Primary Decision unenforceable. However, Global was entitled to the Alternative Decision and the TCC ordered Sudlows to pay Global c.£209k plus VAT, interest, and fees.

Sudlows appealed against the TCC's decision.

Key Principles

In affirming that Adjudicators cannot decide a dispute which is the same or substantially the same as a dispute already decided, the Court of Appeal considered that three overarching principles should be applied when considering potential overlap between adjudication decisions:

- 1) The "*pay now, argue later*" purpose of adjudication is not always easy to reconcile with serial adjudications. If parties repeatedly refer disputes to adjudication, debates ensue as to overlap, and adjudicators and the courts should answer such questions robustly.
- 2) There is the need to look at what the first adjudicator actually decided to see if the second adjudicator impinged on the earlier decision.

- 3) The need for flexibility in preventing a party re-adjudicating an issue which it lost whilst ensuring a new claim or defence was not shut out.

One way to approach the task was to ask whether a second adjudication would lead to a result "*fundamentally incompatible with the result in the first adjudication.*" If, in the second adjudication, a party was asking the adjudicator "*to do something that is diametrically opposed to that which the first adjudicator decided*", that might indicate an erroneous approach.

Issues in the Appeal

Sudlows argued the TCC was wrong to find Mr Molloy was not bound by Mr Curtis' Decision; in particular, as to the ductwork issues being Global's contractual responsibility.

Global argued Adjudication 6 concerned a fresh EOT claim and loss and expense claim; and that as such, Mr Molloy was entitled to his own view on a claim for an EOT beyond 18 January 2021, and on the issue of related loss and expense.

Conclusion on Appeal

Mr Molloy clearly felt he was bound by Mr Curtis' Decision and, whilst the court was not automatically bound by that viewpoint, "*it should be slow to interfere with it, unless it concluded that it was clearly wrong.*" Anything less risked undermining adjudication by "*encouraging repeated challenges to the adjudicator's decision.*"

In the circumstances, the CoA held Mr Molloy had been right to conclude he was bound by Mr Curtis' Decision:

- Mr Molloy properly explained how and why he considered he was bound; he looked at what Mr Curtis had actually decided, including the essential

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issue as to Global's contractual responsibility for the ductwork issues.

- This issue was the only significant dispute in Adjudication 5 and was also at the heart of Adjudication 6.
- This was a very unusual delay case as, in both adjudications, the ductwork issues were the only cause of delay and the period of delay was agreed. As to different EOTs being claimed for different periods of time, that distinction was artificial as there were no competing Relevant Events/other matters on the critical path. Sudlows was correct that the delay claim in Adjudication 6 was a logical extension of that decided in Adjudication 5.
- Mr Curtis' view as to Global's contractual responsibility ductwork issues was binding; any other result would be "fundamentally inconsistent" with Mr Curtis' view.
- The Alternative Decision ignored the essential reasoning explaining the result in Adjudication 5 and upholding it would give rise to two diametrically opposed decisions, which was not in accordance with the principles of adjudication; if that were the case, something had clearly gone wrong with the process.
- The impact of the two supposedly novel reports produced in Adjudication 6 was overstated by Global. The new material was simply a development of the old; the reports might have been new, but they did not go to a new issue or give rise to any new line of investigation.
- In the circumstances, Mr Molloy was correct to discern that, in Adjudication 6, Global was seeking, illegitimately, to re-open the key issue of contractual responsibility which was decided against it in Adjudication 5.

For these reasons, the CoA held the TCC judge had been wrong, and that Mr Molloy had been right to consider himself bound by Mr Curtis' Decision. Sudlows' appeal was therefore allowed, and the Primary Decision awarding Sudlows just under £1 million was reinstated.

Analysis

This case illustrates the tension between serial adjudications and "pay now, argue later". Questions of potential overlap between adjudication decisions are often difficult to navigate and fact-sensitive, but the Court of Appeal reinforced that courts "should be slow to interfere" with an adjudicator's view on this issue, unless "it was clearly wrong."

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