Neutral Citation Number: [2023] EWCA Civ 813

Case No: CA-2023-000042

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGHT COURT
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
Mr Justice Waksman
[2022] EWHC 3319 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2023

Before:

LORD JUSTICE COULSON
LADY JUSTICE ANDREWS
and
LADY JUSTICE ELISABETH LAING

- -

Between:

Sudlows Limited	**Appellant**
- and -	
Global Switch Estates 1 Limited	**Respondent**

- -
- -

Roger Stewart KC & George McDonald (instructed by Pinsent Masons LLP) for the **Appellant**
Alexander Nissen KC (instructed by Macfarlanes LLP) for the **Respondent**

Hearing Date: 8 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 12 July by circulation to the parties or their representatives by e-mail and by release to the National Archives

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LORD JUSTICE COULSON:

1. Introduction

1. An adjudicator cannot determine a dispute which has already been decided in an earlier adjudication. The test is whether the dispute in the second adjudication is the same or substantially the same as the dispute that was decided in the first. That is a matter of fact and degree. Where parties engage in serial adjudication, particularly if the underlying issues are concerned with delay, there is a greatly increased risk of arguments about which side of the line any subsequent dispute might fall. This is just such a case.

2. The later adjudicator decided that he was bound by the findings in an earlier adjudication, which meant that Global, the respondent, were contractually liable for what I have defined below as "the cabling and ductwork issues", and should in consequence pay Sudlows, the appellant, just under £1 million. However, if he had not been bound, the later adjudicator said that he would have come to a different conclusion on the same issue of contractual liability, with the result that Sudlows would have had to pay Global in excess of £200,000. The judge concluded that the later adjudicator had been wrong to find that he was bound by the result in the earlier adjudication, and gave judgment in favour of Global. Sudlows now appeal against the judge's order.

2. The Background Facts

3. All the cross-references below are to the judgment of Waksman J dated 21 December 2022 at [2022] EWHC 3319 (TCC).

4. Global engaged Sudlows, pursuant to a JCT Design and Build Contract dated 22 December 2017, to carry out the fit-out of their data hall at East India Dock House, in London E14. The work involved the installation of five chillers on the roof and the provision of future infrastructure service connections for eight new chillers. The work also involved the creation of a new private electricity sub-station at the site, which in turn involved laying new high-voltage cables from a separate part of Global's premises on the other side of a main road ([4]-[5]).

5. Ductwork under the road and into the site was therefore required. The provision of that ductwork was the contractual responsibility of Global, whilst the procurement and installation of the cables though the ductwork was the responsibility of Sudlows. The ductwork should have been completed by February 2018 but was not completed until 28 May 2019. When Sudlows installed the HV-B cable on 21 June 2019, one of the cables was damaged. It was Sudlows' case that this was due to the defective nature of the ductwork; it was Global's case that this was because the cable and/or the installation was inadequate. There was then a stand-off, with Sudlows refusing to carry out any further work in respect of the cables unless that work was paid for ([6]).

6. In the summer of 2020, a different contractor pulled another set of cables through the ductwork. It was Global's case that Sudlows then refused to terminate, connect and energise those new cables or facilitate others to do it. Sudlows dispute that and the correspondence shows that there were a number of issues in play which this court cannot and does not need to resolve. What is beyond dispute is that, during this period, there was a further stand-off and no progress was made in respect of the ultimate

energisation of the cables and thus the enablement of power to the site ([7]-[8]). I shall refer to these various claims and cross-claims collectively as "the cabling and ductwork issues".

3. The Contract

7. It is unnecessary to set out large parts of the contract between the parties. The provisions concerned with the adjustment of the completion date can be found at clauses 2.23-2.26. Of particular relevance are the following:

> "**Notice of Contractor of delay to progress**
>
> 2.24
> .1 If and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith and in any event within 14 days of the delay event arising give notice to the Employer of the material circumstances including the cause of causes of the delay, and shall identify in the notice any event in his opinion is a Relevant Event.
> .2 In respect of each event identified in the notice the Contractor shall, if practicable in such notice or otherwise in writing as soon as possible thereafter, give particulars of its expected effects, including an estimate of any expected delay in the completion of the Works or any Section beyond the relevant Completion Date.
> .3 The Contractor shall forthwith notify the Employer of any material change in the estimated delay or in any other particulars and supply such further information as the Employer may at any time reasonably require…
>
> 2.25
> .1 If on receiving a notice and particulars under clause 2.24:
> .1 any of the events which are stated to be a cause of delay is a Relevant Event: and
> .2 completion of the Works or of any Section is likely to be delayed thereby beyond the relevant Completion Date…
> then, save where these Conditions expressly provide otherwise, the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he estimates to be fair and reasonable…
> .2 Whether or not an extension is given, the Employer shall notify the Contractor of his decision in respect of any notice under clause 2.24 as soon as is reasonable practicable and in any event within 12 weeks of receipt of the required particulars. Where the period from receipt to the Completion Date is less than 12 weeks, he shall endeavour to do so prior to the Completion Date.
> .3 The Employer shall in his decision state:
> .1 the extension of time that he has attributed to each Relevant Event: and
> .2 (In the case of a decision under clause 2.25.4 or 2.25.5) the reduction in time that he has attributed to each Relevant Omission.
> .4 After the first fixing of a later Completion Date in respect of the Works or a Section, either under clause 2.25.1 or by a Pre-agreed Adjustment, but subject to clauses 2.25.6.3 and 2.25.6.4, the Employer may by notice to the Contractor, giving the details referred to in clause 2.25.3 fix a Completion Date for the

> Works or that Section earlier than that previously so fixed if the fixing of such earlier Completion Date is fair and reasonable having regard to any Relevant Omissions for which the instructions have been issued after the last occasion on which a new Completion Date was fixed for the Works or for that Section.
> .5 After the Completion Date for the Works of for a Section, if this occurs before the date of practical completion, the Employer may, and not later than the expiry of 12 weeks after the date of practical completion shall, by notice to the Contractor, giving the details referred to in clause 2.25.3:
>
> > .1 fix a Completion Date for the Works of for the Section later than that previously fixed if it is fair and reasonable having regard to any Relevant Events, whether on reviewing a previous decision or otherwise and whether or not the Relevant Event has been specifically notified by the Contractor under clause 2.24.1; or
> > .2 subject to clauses 2.25.6.3 and 2.25.6.4, fix a Completion Date earlier than that previously fixed if that is fair and reasonable having regard to any instructions for Relevant Omissions issued after the last occasion on which a new Completion Date was fixed for the Works or Section, or;
> > .3 confirm the Completion Date previously fixed…
>
> **Relevant Events**
>
> 2.26 The following are the Relevant Events referred to in clauses 2.24 and 2.25:
>
> .1 Changes and any other matters or instructions which under these Conditions are to be treated as, or as requiring, a Change…
>
> .6 any impediment, prevention or default, whether by act or omission, by the Employer or any of the Employers Persons, except to the extent caused or contributed to by any default, whether act or omission, of the Contractor of any of the Contractor's Persons."

4. Adjudication 5

8. Adjudication 5 concerned Sudlows' disputed claim for an extension of time of 509 days. The focus was on section 2 of the works. The particular timeslices for programming purposes were Windows 14 – 29 inclusive, namely the delay down to 18 January 2021. It was Sudlows' case that the delays were due to the defective ductwork and therefore the contractual responsibility of Global. That this was their claim in Adjudication 5 can be seen from:

   (a) The Adjudication Notice at paragraph 5, which identified the dispute as being "Sudlows' entitlement to an extension of time to the completion date for Section 2 in respect of delays up to 18 January 2021";

   (b) Sudlows' Referral Notice, which said at paragraph 9.2.1 that "the defective HV-Ductwork provided by Global Switch is a Relevant Event pursuant to clause 2.26.1 and/or clause 2.26.6."

9. As that Referral Notice made clear, the critical issue between the parties was very narrow. There was no dispute that the delay was caused by anything other than the cabling and ductwork issues. There were no other competing Relevant Events, and no

other rival critical path analysis. The delay caused by the cabling and ductwork issues was agreed. So the only issue between the parties was which of them was contractually responsible for the cabling and ductwork issues. It was Sudlows' case (as set out in that Referral Notice) that "the defective ductwork provided by Global, Global's instructions to Sudlows to install replacement cables in the defective duct network without providing Sudlows with accurate as-built information in respect of the defective ductwork provided by Global, and Global's failure to instruct Sudlows accordingly, once Sudlows had evidenced the defective nature of Global's ductwork…constitutes a Relevant Event." It was Global's case that there was nothing wrong with the ductwork, and the problems with the cabling were due to defects in the cables themselves and/or the way in which they had been installed, and were therefore the result of breaches of contract by Sudlows.

10. Not only was the issue of contractual responsibility at the heart of Adjudication 5, but it was also the subject of extensive factual and expert evidence. That evidence is summarised by Mr Curtis, the adjudicator in Adjudication 5, between paragraphs 12.10 and 12.14 of his Decision. In Adjudication 5, Sudlows relied on 5 witness statements and 7 experts' reports. In response, Global relied on 9 witness statements and 9 experts' reports, together with a legal opinion.

11. Amongst the experts' reports relied on by Global were 3 reports from Mr Evans of RINA. Those were all in support of Global's case that there was nothing wrong with the ductwork and that the cabling and ductwork issues were the contractual responsibility of Sudlows.

12. Mr Curtis issued his Decision in Adjudication 5 on 17 May 2021. It ran to 82 pages. He identified and resolved the key issue of contractual responsibility in the following paragraphs of his Decision:

(a) At 13.130, he noted that Sudlows had successfully installed the HV-A cable without damaging the cable.

(b) From 13.131 onwards, he addressed Sudlows' unsuccessful attempts to install the HV-B cables and analysed all the criticisms made of that installation by Global.

(c) At 13.140, he concluded that, on balance, Sudlows' cable-pulling methodology was adequate for the cable route as envisaged by Sudlows based upon the information provided to them by Global.

(d) At 13.185, he concluded on the evidence that Sudlows had proved their allegation that the duct network "was defective and not fit for purpose" and that accordingly "Global are culpable for the resulting delays resulting from their defective duct network".

(e) As to the subsequent 'stand-off', Mr Curtis identified that at 13.195 onwards, explaining that Global refused to accept that there were defects in the duct network and refused to accept that they had any responsibility for the problems, and instead said that the problem should be rectified by Sudlows at their own cost.

(f) At 13.229, he concluded that "the primary cause of the damage to the HV cables was Global's defective duct network" and that Global were "hence liable for any resultant delays to the Completion Date."

(g) Having noted that Global then engaged other contractors to install new cables, Mr Curtis then went on to address Global's instruction to Sudlows to connect those cables to the electrical system, and to test and energise it (paragraph 13.280 onwards). He considered the evidence as to Sudlows' refusal to energise the new cables and concluded at 13.289 that Sudlows "were correct and entitled to refuse to connect and energise the HV supply provided by Global" and that "Global are culpable for any delays that flow from this issue."

13. In case there was any doubt about it, at paragraph 13.291, Mr Curtis said in terms:

> "It is common ground between the parties that the dominant cause of the delays to Practical Completion of the Section 2 Works had been the issues covered in the previous section regarding the termination and energisation and testing of the HV supply system".

In other words, the delay flowing from the cabling and ductwork issues was all that mattered for the purposes of the claim for an extension of time, and he had already found that contractual responsibility for those issues rested with Global.

14. Thereafter, the adjudicator dealt with the experts' delay analysis. For the reasons previously explained, there was nothing of substance between them. So, in line with his previous findings, Mr Curtis said that Sudlows were entitled to a total extension of time of 482 days, which included 82 days for Windows 18-21, 144 days for Windows 21-28, and 234 days in respect of Window 29 (paragraphs 14.130 – 14.131).

15. The section entitled 'DECISION' addressed Sudlows' specific claims for extensions of time. He awarded a total extension of time of 482 days which he had previously calculated at paragraphs 14.130-14.131. That gave Sudlows an entitlement to an extension of time down to 8 December 2020. There was therefore a shortfall of about 5 weeks for which Sudlows were found to be responsible. Beyond that, Global were, in accordance with Mr Curtis' decision, responsible for the entirety of the remainder of the delay, because they were contractually responsible for the cabling and ductwork issues.

5. Adjudication 6

16. On 17 May 2021, following their loss of Adjudication 5, Global could no longer wait and hope that the deadlock might somehow be broken in another way; they had been held liable for the delay, so every day of further delay was to their account. In order to progress matters, they had no other option but to omit the testing and energisation of the new cables from Sudlows' scope of work. Since that was the only outstanding element of that work, the omission allowed the contract administrator to certify Practical Completion as having been achieved on 7 June 2021. Subsequently, the new cables were successfully tested by others on 18 August 2021 and energised on 19 August 2021.

17. Sudlows sought a further extension of time from 19 January 2021 to the date of Practical Completion of 7 June 2021, an additional period of 133 days. This was referred to as Window 29+. Sudlows described this as the continuation of the delay assessed in Adjudication 5 flowing from the cabling and ductwork issues.

18. The further claim for an extension of time for the additional period was refused. Sudlows therefore commenced Adjudication 6. In their Referral Notice, Sudlows made plain that they were relying on the same Relevant Event as they had relied on in Adjudication 5, and upon Mr Curtis' finding that the defective ductwork had damaged the cables and caused the delay. Sudlows contended that the "natural consequences" of Mr Curtis' decision in Adjudication 5 was the grant of the further 133 days extension of time. The Referral Notice also contained a full loss and expense claim, amounting to just over £12 million.

19. In their lengthy Response document in Adjudication 6, Global made no bones about their dissatisfaction with Mr Curtis' Decision in Adjudication 5. They said in terms that Sudlows should not have been awarded 481 of the 482 days extension of time that he awarded (paragraph 421). They said that there was no Relevant Event that permitted an extension of time, because it was Sudlows who were contractually responsible for the cabling and ductwork issues (see for example paragraph 424). To confirm that stance, in Adjudication 6, Global relied on all the documentation and evidence that they had (unsuccessfully) sought to advance in front of Mr Curtis: see the documents set out at paragraph 74 of their Response.

20. The principal new evidence upon which Global relied in Adjudication 6 consisted of two further short reports by the certification company, RINA, dated 20 and 26 August 2021, dealing with the testing in August 2021. Their case was that this evidence – which only came into existence after the decision in Adjudication 5 - demonstrated that there was nothing wrong (and had never been anything wrong) with the ductwork.

21. The adjudicator in Adjudication 6 was Mr Molloy, an extremely experienced construction adjudicator. His lengthy decision, which ran to 347 paragraphs, was dated 9 September 2022. The relevant parts of that decision are set out at [27]-[35] of the judgment below. It is unnecessary to set those paragraphs out again here. In summary, Mr Molloy decided that he was bound by Mr Curtis' findings and reasoning in Adjudication 5 and that, if he was so bound, Sudlows were entitled to £996,898.24 by way of loss and expense. He said at paragraphs 39 and 41:

> "**39.** It is notable from paragraph 68 of *Global Switch* that O'Farrell J's view was that the reasoning for a decision is not binding, and also from *Hyder* and *Thameside* (both of which are referred to by O'Farrell J) that Edwards-Stuart J and Akenhead J were of the view that, although a finding can be binding, this is restricted to a finding which forms an "essential component of" or "basis for" the decision. In determining what the adjudicator has decided, Akenhead J makes it clear that it is necessary to look at what the previous adjudicator decided and that, in doing so, this can involve looking at "the pleading" type documents. Thus the dispute which the adjudicator decided will include the parties' respective arguments in respect of an issue which fall to be addressed in order to reach their decision…

> **41.** It is clear that the issue of whether Sudlows was correct to refuse to connect and energise the HV-B supply formed part of the dispute which Mr Curtis was required to decide. As such, it follows that Mr Curtis's finding that Sudlows was correct and that Global Switch is culpable for any delays that flow from that issue did form an essential component of and basis for his Decision. That being the case, it follows that the parties are bound by Mr Curtis's finding and reasons in this respect. I will therefore proceed on this basis when addressing the question of Sudlows' entitlement to a further extension of time for Section 2 in respect of Window 29+ and the associated time related monetary claims. However, I will also address the alternative position for the reason set out at paragraphs 24 above."

22. Mr Molloy's alternative finding, if he was wrong about that and so not bound by Mr Curtis' findings and reasoning, was that, on the evidence before him, he would have concluded that "the more probable cause of the failure of the Cabelte cable installation was either the selection of the cable itself or the method of cable installation and not the duct installation or configuration". Those matters would have been Sudlows' responsibility. On that basis, he would not have granted the 133 days extension of time for Window 29+, and would allow Global's claims for liquidated damages for that period, giving rise to his alternative calculation of £209,053.01 in favour of Global.

23. It is important to note that, on either basis, Mr Molloy did not disturb the extension of time for Window 29 up to December 2020 granted by Mr Curtis in Adjudication 5. He also awarded Sudlows their loss and expense for this period, and that too was not the subject of challenge before the judge.

6. The Judgment Below

24. Having set out the background facts and the useful summary of Adjudications 5 and 6, the judge then addressed the issues at [37]-[39]. He said that the critical debate was what he called the "prior decision issue".

25. As to that, the judge set out the law at [40]-[61] before commencing his analysis at [62]. The heart of his reasoning can be found at [65]-[68] as follows:

> "65. In addition, one needs to take into account the circumstances of and material relating to the relevant part of the dispute which is, here, the further EOT. That is apparent from *Quietfield* where the basis for the EOT claim in the early adjudication was contained in the 2 letters, while the basis for the claim for the same EOT, but this time submitted as a defence to the liquidated damages claim in the later adjudication, was Appendix C. That was sufficient to differentiate the two adjudications.
>
> 66. In the case before me, the difference in materials concerns not those which supported the underlying claim but rather those ranged against it by the employer. But that makes no difference in terms of forming part of the dispute.
>
> 67. Those materials consisted of the fact and result of the successful testing of the new cables in the existing ductwork and the two RINA reports. It is worth referring back to Mr Molloy's analysis of them at his paragraphs 170-176, set out at paragraph 33 above. The effect of that material on Mr Molloy was quite

> dramatic, because it caused him to conclude that (a) the original ductwork and cables were fit for purpose and (b) the refusal on the part of Sudlows to facilitate the termination, connection and subsequent energisation was unreasonable. The latter finding was also made on the basis that properly analysed, what Sudlows was being asked to do was not itself to terminate, connect and energise the cables but merely to facilitate that work by different contractor. The fact that Sudlows contended at the time, as it does now, that the new materials take the matter no further is irrelevant. They clearly did in the eyes of Mr Molloy and that view is not one which can be challenged.
>
> 68. In those circumstances, it cannot be said that Global was simply repeating its previous argument without more. It was relying on the testing and reports, being an event and evidence that simply did not previously exist. That, in turn, was a function of the fact that Adjudication 5 did not, and could not, deal with the entirety of the relevant contractual period since it had not yet expired. Moreover, this was not a case where a contractor claimant might be said to seek a further adjudication artificially, in order to re-run an argument it had previously lost. It is about a respondent employer putting forward a defence to a new adjudication claim relating to a different time period, so there was no artificiality on its part."

26. One of the arguments before the judge concerned the existence of the same Relevant Events in both adjudications. The judge said:

> "70. However, the fact that in both adjudications, the existence or otherwise of those Relevant Events was an issue, is plainly insufficient to mean that in both adjudications, the dispute was the same or substantially so.
>
> 71. That is because (a) they relate to underlying EOT's for different periods of time, (b) the dispute in relation to the new EOT sought involved new relevant materials and the event of testing which were not, and could not, have been part of the dispute leading to the prior adjudication, and (c) this particular issue formed only one part of a much wider dispute between the parties as to the true value of the contract works as a whole, engendered by Sudlows Interim Application for Payment Number 46; the latter was in fact its final payment claim, on the basis that practical completion had now taken place. Indeed, in my judgment, elements (a) and (b) alone would suffice."

27. Accordingly the judge concluded at [77] that the two disputes were not the same or substantially the same, and that Mr Molloy was not bound by Mr Curtis' earlier decision in relation to the availability of an extension of time for the earlier period. At [82], the judge then considered Mr Molloy's opposite conclusions on the prior decision issue and said this:

> "82. However, and while I pay tribute to Mr Molloy's analysis and reasoning here, it is, in my view, clearly wrong. First, the cases make clear that the jurisdictional question involves an analysis of what <u>both</u> disputes are about, and whether they are the same or substantially so. Mr Molloy did not apply that test at all. Second, he failed to give any real weight to the fact that the decision in Adjudication 5 was as to an EOT for a prior period. Third, having said that both parties' "arguments" had to be looked at in relation to the relevant "issue"

> he made no reference to the new material adduced before him and which, as we know, he considered to be so significant. This was more than argument - it was new evidence. One of the reasons why, I suspect, he did not consider this is because he was focusing too much on the decision in Adjudication 5 in something of a vacuum, as it were."

28. In those circumstances, as the parties had agreed, the judge found that there was a consequential breach of natural justice and the principal decision in Adjudication 6 could not be enforced [84]. The judge went on to find at [85]-[91] that Global were entitled to the enforcement of Mr Molloy's alternative conclusion in their favour.

7. The Law

7.1 The Rule Against Re-Adjudication

29. Section 108 of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") introduced the right for either party to a construction contract to refer a dispute to adjudication. S.108(3) provides:

> "The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, or by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement."

30. Paragraph 9(2) of the Scheme for Construction Contracts provides that "an adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication". Paragraph 20 of the Scheme provides that the adjudicator shall decide the matters in dispute, and gives him the power, amongst other things, to open up, revise and review any decisions under the contract, to award sums of money and interest. Paragraph 23 of the Scheme provides at sub-paragraph (2) that:

> "The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

31. These provisions have been taken together as providing that a second adjudicator cannot decide a dispute which is the same or substantially the same as a dispute that has already been decided in an earlier adjudication.

7.2 The Purpose of Construction Adjudication

32. As with any issue arising out of construction adjudication, it is as well to recall its essential purpose. As May LJ put it in *Quietfield Limited v Vascroft Construction Limited* [2007] BLR 67 ("*Quietfield")* at [2], "adjudication is intended to provide a speedy and proportionate temporary decision of disputes arising under construction contracts. The idea includes that such a decision may both hold the ring for the moment in a fair way, and help the parties, if possible, to resolve their dispute finally by agreement without the need for protracted and often very expensive arbitration or

litigation." In similar vein, Chadwick LJ said in *Carillion Construction Limited v Davenport Royal Dockyard Limited* [2005] EWCA Civ 1358 [2006] BLR 15 at [86]:

> "The task of the adjudicator is to find an interim solution which meets the needs of the case…The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their sub-contractors. The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions."

33. The practice of serial adjudication, involving repeated references of disputes to adjudication under the same contract, is not always easy to reconcile with the emphasis on speed and proportionality. Put more shortly, it is harder to adhere to the principle of 'pay now, argue later' when you are constantly arguing now. In *HG Construction v Ashwell Homes (East Anglia) Ltd* [2007] EWHC 144, Ramsey J described (perhaps optimistically) a contractual provision making the findings of an earlier adjudicator binding on the later adjudicator as "providing a limit to serial adjudications." Similarly, in *Benfield Construction Limited v Trudson Limited* [2008] EWHC 2333 (TCC), I noted at [57] that "adjudication is supposed to be a quick one-off event; it should not be allowed to become a process by which a series of decisions by different people can be sought every time a new issue or a new way of putting a case occurs to one or other of the contracting parties."

34. Although an adjudicator can only decide a single dispute (see s.108(1) and the reference to "refer a dispute"), many of the potentially adverse effects of that restriction were long ago ameliorated by the decision in *Fastrack Contractors Ltd v Morrison Construction Ltd* (2000) 75 Con LR 33 at [20], which held that a single dispute could be made up of many separate claims. It is this potential tension, between the single dispute referred and the myriad claims of which it may be comprised, which has meant that, from time to time, the court has had to consider what actually makes up an adjudicator's decision. The cases in which that issue has arisen have not been limited to disputes about the binding nature of prior decisions, but have applied to adjudication disputes more widely. *Hyder Consulting (UK) Limited v Carillion Construction Limited* [2011] EWHC 1810 (TCC); [2011] 138 Con LR 212, is an example. There Edwards-Stuart J had to consider what the adjudicator did or did not do, in order to work out if there had been a breach of natural justice. He said at [36] that in most cases the adjudicator's decision would be the determination of a sum of money or a declaration. But at [38] he went on to explain that the decision consisted not only of the actual award but "any other finding in relation to the rights of the parties that forms an essential component of or basis for that award".

7.3 The Leading Cases on the Binding Nature of Previous Decisions

35. In *Quietfield*, the contractor, Vascroft, made an application for an extension of time by way of two letters dated 2 September 2004 and 22 April 2005. The architect did not grant an extension of time and Vascroft referred that dispute to adjudication. The adjudicator considered the two letters but concluded that Vascroft had not provided either evidence or reasoned analysis to demonstrate that the events upon which they relied caused delay to the completion of the works. No extension of time was granted by the adjudicator.

36. Subsequently, Quietfield began what was known as the third adjudication claiming an entitlement to liquidated damages because of the delay. Vascroft resisted Quietfield's claim, contending that they were entitled to an extension of time for the whole period of delay. They relied on a lengthy document called Appendix C, setting out their case. An issue arose as to whether the adjudicator in the third adjudication could pay any regard to Appendix C, or was precluded from so doing by the earlier decision that no extension of time was due. The adjudicator concluded that he was bound by his decision in the first adjudication.

37. The matter came before Jackson J (as he then was) in the TCC. He said that the adjudicator was not bound. He identified four principles, of which the first two are relevant to this appeal:

> "(i) Where the contract permits the contractor to make successive applications for extension of time on different grounds, either party, if dissatisfied with the decisions made, can refer those matters to successive adjudications. In each case the difference between the contentions of the aggrieved party and the decision of the architect or contract administrator will constitute the "dispute" within the meaning of section 108 of the 1996 Act.
>
> (ii) If the contractor makes successive applications for extension of time on the same grounds, the architect or contract administrator will, no doubt, reiterate his original decision. The aggrieved party cannot refer this matter to successive adjudications. He is debarred from doing so by paragraphs 9 and 23 of the Scheme and section 108(3) of the 1996 Act…"

Those principles were approved by the Court of Appeal.

38. May LJ confirmed at [20] that, once a dispute had been determined by adjudication, there cannot be another adjudication about the same dispute. The adjudicator's decision remains binding on the parties unless and until it is overtaken by a judgment of the court, an arbitration award or a settlement agreement. He said at [32]:

> "So the question in each case is, what did the first adjudicator decide? The first source of the answer to that question will be the actual decision of the first adjudicator. In the present appeal, Mr Holt did not even take us to the first adjudicator's decision, although he was invited more than once by the court to do so. He was conscious, no doubt, that it would show, as it does, that the decision was limited to the grounds for extension of time in the two letters."

39. May LJ went on to say that the judge had been correct to conclude that, in the first adjudication, the dispute was the claim for an extension of time on the grounds advanced in the two letters. Then at [37] he explained that, because Vascroft's Appendix C in the third adjudication identified a number of causes of delay which did not feature in the two letters, it was substantially different from the claims for an extension of time which were advanced, considered and rejected in the first adjudication. He concluded that the adjudicator was wrong in the third adjudication not to consider Appendix C.

40. Dyson LJ (as he then was) agreed, although he also added some observations of his own. As to the contractual provisions in play, at [42] he saw no reason to construe them

as prohibiting the contractor from relying on the same Relevant Event that he had relied on in support of the previous application for an extension of time, giving materially different particulars of the expected effects and/or a different estimate of the extent of the expected delay. He said there was nothing in the express language of the Contract which prevented the contractor from making good the deficiencies of an earlier application in a later application.

41. More widely, having drawn the analogy with *Henderson v Henderson* [1843] 3 Hare 100 and *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC1, Dyson LJ said at [47]:

> "Whether dispute A is substantially the same as dispute B is a question of fact and degree. If the contractor identifies the same Relevant Event in successive applications for extensions of time, but gives different particulars of its expected effects, the differences may or may not be sufficient to lead to the conclusion that the two disputes are not substantially the same. All the more so if the particulars of expected effects are the same, but the evidence by which the contractor seeks to prove them is different."

42. In *Harding (Trading as MJ Harding Contractors) v Paice & Anr* [2015] EWCA Civ 1231; [2016] 1 WLR 4068 the contractor applied unsuccessfully to injunct a further adjudication which he said sought to adjudicate a dispute that already had been decided but which the court concluded was a different dispute. In looking at the comparison exercise, Jackson LJ said at [57]:

> "57. It is quite clear from the authorities that one does not look at the dispute or disputes referred to the first adjudicator in isolation. One must also look at what the first adjudicator actually decided. Ultimately it is what the first adjudicator decided, which determines how much or how little remains available for consideration by the second adjudicator."

43. In *Brown v Complete Buildings Solutions Ltd* [2016] EWCA Civ 1; [2016] BLR 98 ("*Complete*"), the first adjudicator had decided that the Final Certificate was ineffective and a subsequent letter of 20 December 2013 was not a valid payment notice, so no sum was payable. The second adjudicator concluded that a notice of 1 April 2014 was an effective notice and the refusal to pay created a dispute which was not the same or substantially the same as the one decided in the earlier adjudication.

44. Simon LJ identified the principles thus:

> "Although a number of decisions were referred to by the parties the applicable principles are conveniently summarised by Coulson J in *Benfield Construction Ltd v. Trudson (Hatton) Ltd* [2008] EWHC 2333 (TCC) at [34], adopting the summary set out by Ramsey J in *HG Construction Ltd v. Ashwell Homes (East Anglia) Ltd* [2007] EWHC 144 (TCC) at [36].
>
> (a) The parties are bound by the decision of an adjudicator on a dispute or difference until it is finally determined by court or arbitration proceedings or by an agreement made subsequently by the parties.

> (b) The parties cannot seek a further decision by an adjudicator on a dispute or difference if that dispute or difference has already been the subject of a decision by an adjudicator.
>
> (c) The extent to which a decision or a dispute is binding will depend on an analysis of the terms, scope and extent of the dispute or difference referred to adjudication and the terms, scope and extent of the decision made by the adjudicator. In order to do this the approach has to be to ask whether the dispute or difference is the same or substantially the same as the relevant dispute or difference and whether the adjudicator has decided a dispute or difference which is the same or fundamentally the same as the relevant dispute or difference.
>
> (e) (*sic*) The approach must involve not only the same but also substantially the same dispute or difference. This is because disputes or differences encompass a wide range of factual and legal issues. If there had to be complete identity of factual and legal issues then the ability to readjudicate what was in substance the same dispute or difference would deprive clause [9.2] of its intended purpose.
>
> (f) Whether one dispute is substantially the same as another dispute is a question of fact and degree."

45. On the facts, Simon LJ concluded that the second adjudicator had been correct to conclude that he was not considering the same or substantially the same dispute as the first adjudicator. Although the parties were bound by the express finding in the first adjudication that the Final Certificate was ineffective and that the letter of 20 December 2013 did not constitute a valid notice, the second adjudicator was being asked to decide whether a different notice, served 4 months later, had different consequences. Although both notices were dependent on the ineffectiveness of the Final Certificate and claimed the same sum, the respondent was not seeking the redetermination of any matter that had been decided by the first adjudicator. Simon LJ said at [25] that "self-evidently neither this (later) notice nor the consequences that flowed from it (the entitlement to be paid if no counter notice was served) gave rise to disputes which had been referred to [the first adjudicator]. The respondent was not making good a shortcoming in the earlier matter; it was approaching its claim via a new and different route."

7.4 The First Instance Authorities

46. There are a number of first instance authorities which deal with the issue of overlap. I refer to some simply to illustrate the principles in practice.

47. In *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] EWHC 2218 (TCC); [2009] 127 Con LR 110, a sub-contractor had first referred to adjudication a limited dispute about delay caused by late access to one particular part of the site. Akenhead J found that that did not prevent the second adjudicator from dealing with a later claim by the Contractor for a full extension of time, which by that stage was retrospective.

48. The same judge reached a different conclusion on the facts in *Carillion Construction Ltd v Smith* [2011] EWHC 2910 (TCC); 141 Con LR 147. He said that the dispute referred to the adjudicator in the third adjudication was the same or substantially the same as that referred to in the second adjudication, because both involved a claim for

loss and expense relating to the same breaches and default on the part of Carillion. The heads of claim were the same; the only thing which had changed between the two adjudications were the supporting calculations and the figures themselves. That was not enough to avoid the conclusion that the disputes were the same or substantially the same.

49. At [56] of his judgment in *Carillion*, Akenhead J identified some guidance as to the comparison exercise required in these sorts of cases. The judge said at (1) that the court needed to take "a reasonably broad brush approach". At (2) and (3) the judge indicated that the fact that different or additional evidence, and/or different or additional arguments, are deployed in a later adjudication will not usually alter what the essential dispute is or has been, or mean that it is a different dispute. He also made the point at (7) that notices of adjudication or referral notices were not required to be in any particular form and should not be construed as if they were contracts, pleadings or statutes.

50. In *Hitachi Zosen Inova AG v John Sisk & Son Ltd* [2019] EWHC 495 (TCC), the dispute was similar to that in *Harding v Paice*, in that a particular claim, in this case Event 1176, had been referred to the first adjudicator but he had given it a 'nil' value because there was no evidence to support it. Subsequently, the contractor put in a detailed claim for Event 1176. Stuart-Smith J (as he then was) decided that the second adjudicator was entitled to decide that dispute. On the facts, he found that Sisk had misjudged the evidence in the earlier adjudication, had then gone away and done considerable additional work before coming back a significant time later with evidence that was held to be sufficient to substantiate a large claim. He saw nothing oppressive about that approach and held that, because the first claim in respect of Event 1176 was referred to adjudication but not decided on its merits, it was legitimately referred to the subsequent adjudicator.

51. The case is important because of the judge's thoughtful analysis of the issue of overlap. He noted at [31] that, although the adjudicator's view of whether one dispute is the same or substantially the same as one that has already been decided may be influential, it cannot bind the court if the court is asked to determine the issue. He said at [31] that the principles applicable to issue estoppel were not the same as those needed to guard against repetitive adjudication of the same issue, and might be liable to confuse if attempts were made to apply those principles to adjudication.

52. In my view, what is particularly significant about *Hitachi* is the judge's focus on the comparison to be made "between what was *referred* in the eighth Adjudication and what was *decided* in the second." This emphasis on the importance of the decision in the earlier adjudication rather than the referral led him to doubt some elements of the guidance given by Akenhead J in *Carillion v Smith* (paragraph 49 above), which appeared to concentrate on what was *referred* in the earlier adjudication rather than what was *decided*.

53. In *Lewisham Homes Ltd v Breyer Group PLC* [2021] EWHC 1290 (TCC) Waksman J summarised the applicable principles at [34]. These largely reflect those approved by Simon LJ in *Complete*. Of relevance to the present case was sub-paragraph (6), in these terms:

> "(6) Whether the dispute is substantially the same as another is a question of fact and degree. It seems to me that the inquiry is likely to focus on the key elements of the dispute before and the decision of the first adjudicator, even if the underlying subject matter is the same. For example, an application for an extension of time based on a particular relevant event. The particulars of its expected effects and/or the evidence used to prove them may lead to the conclusion that overall the dispute second time round is not the same as the first. Another example of that can be seen in *Hitachi* itself where the issue concerned whether the adjudicator in a second adjudication had decided about the variation which had to be valued, which in fact he did not value, and whether that was substantially the same. In that particular case, the first adjudicator had decided there was a variation that required a valuation, but for want of evidence decided that no sum was payable for the purpose of one particular payment application. He went on to find that the valuation for any other purpose in the context of the claim had not been decided, and therefore the jurisdiction point did not run. That is a good illustration of how the exercise of comparison is one of fact and degree."

54. In an earlier iteration of the present case, *Global Switch Estates 1 Ltd v Sudlows Ltd* [2020] EWHC 3314 (TCC); [2021] BLR 111, the dispute concerned the adjudicator's failure to consider Sudlows' defence based on its additional claims for loss and expense. It was nothing to do with the issue in the present appeal. However, in her *obiter* observations at [66]-[74], O'Farrell J rejected Sudlows' alternative argument that the later adjudicator, Mr Davies, had trespassed on decisions previously made by Mr Curtis. It appears that the judge considered that, whilst Mr Curtis had granted the relevant extension of time, Mr Davies, when dealing with loss and expense in respect of individual items, was entitled to a certain amount of latitude in calculating the figures, even if that meant, in or two specific areas of granular detail his conclusions were at odds with those of Mr Curtis.

7.5 Summary of Relevant Principles

55. I shall resist the temptation to set out a list of the principles that can be derived from these authorities on the effect of earlier decisions in later adjudications. That task has been undertaken on a number of occasions in the past and the basic rules are, to my eye, crystal clear. I consider that there are three over-arching principles to be applied by an adjudicator, or an enforcing court, when considering arguments of overlap.

56. The first is that the purpose of construction adjudication is not easy always to reconcile with serial adjudication (paragraphs 32 and 33 above). If the parties to a construction contract do engage in serial adjudication, and then inevitably get drawn into debates about whether a particular dispute has already been decided, the need for speed and the importance of at least temporary finality mean that the adjudicator (and, if necessary, the court on enforcement) should be encouraged to give a robust and common sense answer to the issue. It should not be a complex question of interpretation of documents and citation of authority.

57. The second is the need to look at what the first adjudicator actually decided to see if the second adjudicator has impinged on the earlier decision (*Quietfield, Harding v Paice, Hitachi*). Of course it can be relevant to consider the adjudication notice, the referral

notice and so on, but what matters for the purposes of s.108 and the paragraphs of the Scheme noted above, is what it was, in reality, that the adjudicator decided. It is that which cannot be re-adjudicated. The form and content of the documentation with which he was provided is of lesser relevance and, as was pointed out in *Harding v Paice* and *Hitachi,* can be misleading.

58. The third critical principle is the need for flexibility. That is the purpose of a test of fact and degree. It is to prevent a party from re-adjudicating a claim (or a defence) on which they have unequivocally lost (*HG Construction*, *Benfield*), but to ensure that what is essentially a new claim or a new defence is not shut out. In this way, the re-adjudication in *Carillion v Smith* of the same claims, where the only differences were the figures, was impermissible whilst a new, wider, claim or defence was permissible, even if it included elements of a claim which had been considered before, such as in *Quietfield,* and *Balfour Beatty.* Indeed, I consider that the result in each of the reported cases to which I have referred is the product of common sense and fairness.

59. Whilst I accept that it is not an invariable guide, one way of at least testing whether the correct approach has been adopted is to consider whether, if the second adjudication is allowed to continue, it would or might lead to a result which is fundamentally incompatible with the result in the first adjudication. If in that second adjudication, one or other of the parties is asking the adjudicator to do something that is diametrically opposed to that which the first adjudicator decided, then that may be an indication that what they are seeking to do is impermissible.

8. The Issues in the Appeal

60. I note at the outset two matters that were not in issue in the appeal. First, it was common ground before the judge and on appeal that, as a matter of principle, it would be a breach of natural justice for an adjudicator to take an unduly restrictive view of his or her jurisdiction and that, if that happened in a material respect, the adjudicator's decision (or the relevant part of it) would be unenforceable. I express no view as to the soundness of that common assumption. Secondly, I note that Sudlows raised with the judge their objection to the adjudicator providing two alternative answers, and whether the severance of the Decision, so that only one answer was enforced, was permissible. The judge found against Sudlows on that point at [85] – [91] and there is no appeal against that part of his judgment.

61. Moving on to the principal dispute, Sudlows say that the judge was wrong to find that Mr Molloy was not bound by Mr Curtis' finding in Adjudication 5. Their argument focused on Mr Curtis' decision in Adjudication 5, that the agreed period of delay caused by the cabling and ductwork issues was the contractual responsibility of Global. They said that this conclusion was binding on Mr Molloy in Adjudication 6 (as he had correctly found).

62. In response, Global say that Adjudication 6 concerned a fresh claim for an extension of time and an entirely new claim for loss and expense. They accept that Mr Molloy could not revisit the extension of time granted in Adjudication 5, but say that, in his alternative findings, Mr Molloy was entitled to come to his own view about the new claim for an extension beyond 18 January 2021, and the consequential claim for loss and expense.

9. Analysis

9.1 Mr Molloy's Decision on Jurisdiction

63. I confess that, contrary to Mr Stewart's breezy assurance at the outset of the appeal that "this is not a very difficult case to decide", I have found it more of a borderline case than any of the authorities to which I have referred in Section 7 above. That is perhaps unsurprising, given that the experienced adjudicator in Adjudication 6 (Mr Molloy) concluded that he was bound by the Decision in Adjudication 5, whilst the experienced TCC judge (Waksman J) decided that he was not.

64. I can also see the force of the forensic points made by each side when they sought to outline the adverse consequences for adjudication generally if their arguments were not accepted. So, if Sudlows are right, and Mr Molloy was bound by the decision of Mr Curtis, there is a risk that a later adjudicator would be bound by a decision that was reached on incomplete or unsatisfactory evidence. On the other hand, if Global are right, and a key dispute could be re-adjudicated a few weeks after the first decision and give rise to a wholly different result, there is a risk that nothing in adjudication would be regarded as final, even temporarily.

65. However, those are theoretical, rather than real, dangers, and they stem in part from the particular features of construction adjudication, and in part from what leading counsel accepted were the unusual facts of this case. As a matter of practice, adjudicators (and, where necessary, enforcing courts), have not found very much difficulty in determining where the lines should be drawn. In the present case, Mr Molloy concluded that he was bound by the Decision in Adjudication 5. That finding, and its potential significance, has perhaps got rather lost in the subsequent litigation. Whilst the court is not bound by such a ruling (*Amec Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418; [2005] BLR 1), it should be slow to interfere with it, unless it concluded that it was clearly wrong. Anything less runs the risk of undermining the adjudication process by encouraging repeated challenges to the adjudicator's decision.

66. In my view, Mr Molloy was not clearly wrong to say that he was bound by the decision in Adjudication 5. Indeed, as a matter of fact and degree, I consider that he was right to reach that conclusion, and that Waksman J was wrong to come to a different view. Although, as I shall demonstrate, the principal reason for that conclusion arises from the unusual facts of this case, there are a number of factors which have led to it.

67. The starting point of any analysis should be Mr Molloy's conclusion that he was bound by the decision in Adjudication 5. Although Waksman J said at [82], without elaboration, that he did not apply the right test in coming to that view, I do not agree. At [39] and [41] of his decision in Adjudication 6 (paragraph 21 above), Mr Molloy properly explained how and why the parties were bound by Mr Curtis' decision. He looked at what Mr Curtis had actually decided, including the essential finding as to Global's contractual responsibility for the cabling and ductwork issues. Because that was the same issue that had been referred to him, he concluded that this was sufficient to bind him in respect of the further extension period claimed in Adjudication 6. In my view, that was the result of the application of the right test, as articulated in the authorities set out in Section 7.3 above.

68. As to Waksman J's suggestion that the extension awarded in Adjudication 5 was for a different period of time to that claimed in Adjudication 6, I deal with that in detail below, when I turn to the substance of the comparison exercise. Suffice to say that, in my view, the fact that the Decision in Adjudication 5 related to a different period of time was, on the particular facts of this case, of little weight. And I consider that the third reason that Waksman J relied on for his conclusion that Mr Molloy was clearly wrong, namely the failure to refer to the further evidence, improperly elided the question of the dispute between the parties that was decided in the earlier adjudication, with the evidence deployed by the parties in pursuance of that dispute.

69. Accordingly, on the face of it, I do not consider that there is sufficient justification for departing from the view of Mr Molloy on the critical issue of overlap. It is important that, in serial adjudications, the policing of this sort of debate is primarily left to the adjudicators themselves. The court should only intervene when something has gone clearly wrong in a later adjudicator's decision. In my view, that is not this case.

9.2 The Same or Substantially the Same

70. Applying the principles of law summarised in Section 7 above, I have concluded that the dispute in Adjudication 5 was the same or substantially the same as the dispute referred in Adjudication 6. In Adjudication 5, as I have endeavoured to explain at paragraphs 8 - 15 above, the only significant dispute was which of the parties was contractually responsible for the cabling and ductwork issues. That self-same issue was also at the heart of Adjudication 6.

71. In my experience, that makes this a very unusual delay case. It is almost always the case that, in disputes of this kind, the arguments about delay range across different competing Relevant Events, the different alleged effects of those different Relevant Events, and the consequences of different critical path analyses. But none of that was in play, either in Adjudication 5 or in Adjudication 6. In both adjudications, it was agreed that the cabling and ductwork issues were the only cause of the relevant delay. That period of delay was also agreed. In this way, the only substantive dispute was which party was contractually responsible for those issues, and therefore that delay. Mr Curtis decided that it was Global who were responsible. He came to that conclusion on the basis of a huge volume of evidence, both factual and expert (see paragraphs 10 and 11 above).

72. In my judgment, in accordance with the provisions set out in Section 7.1 above, Mr Curtis' clear view as to Global's contractual responsibility for the cabling and ductwork issues was binding on the parties and binding on any subsequent adjudicator. Any other result – that contractual responsibility lay with Sudlows, not Global – would be fundamentally inconsistent with the binding decision of Mr Curtis. If Global wanted to challenge his decision, as they clearly did, then they had every right to do so: but the challenge had to go to court or arbitration, not by way of another adjudication.

73. In reality, Global's stance in Adjudication 6 was an unabashed challenge to Mr Curtis' decision in Adjudication 5. Although there were elements of their Response to the Referral Notice in which Global accepted Mr Curtis' Decision, the reality was that Global intended this to be a root-and-branch challenge to his Decision. Hence they sought to deploy all the same evidential material which had already been considered and (in the final analysis) rejected by Mr Curtis. That ignored the binding nature of Mr

Curtis' decision on the critical dispute as to contractual responsibility, and put Global in breach of s.108 of the HGCRA and the various paragraphs of the Scheme set out above.

74. On appeal, Mr Nissen's arguments to the contrary boiled down to three clear propositions. The first was his submission that the dispute in respect of which Mr Curtis provided a binding decision was Sudlows' entitlement to an extension of time for a particular period, rather than any question of contractual responsibility for the cabling and ductwork issues. The second was his submission that, in any event, since in Adjudication 6 Sudlows were claiming an extension of time for a period that was different to that considered by Mr Curtis, Mr Molloy had an unfettered right to consider the claim, including the issue of contractual responsibility, afresh. The third was his submission that the evidence before Mr Molloy could not have been produced in Adjudication 5, because it did not exist, and that it would be wrong and unfair to shut it out. I have carefully considered each of those submissions but, on the particular facts of this case, I reject them, for the reasons explained below.

a) The Binding Elements of Mr Curtis' Decision

75. I consider that it is an elevation of form over substance to say that the only binding element of Mr Curtis' Decision in Adjudication 5 was his award of 482 days extension of time to Sudlows, and nothing else. That ignores the reality of the Decision in Adjudication 5, and seeks to reduce that part of the Decision which is binding simply to the quantum of its final result.

76. It is an approach which is contrary to the analysis in *Hyder* (because it ignores what was, on any view, the essential component of Mr Curtis' reasoning) and would have reversed Akenhead J's conclusion in *Carillion v Smith* and allowed the fresh referral to take place because, although the underlying claim was the same, the figures were different. That cannot be right: it comes from looking at the form of the result, not the substance of it.

77. Mr Nissen suggested that, if in Adjudication 5, Sudlows had sought a declaration that Global were contractually responsible for the cabling and ductwork issues, or had sought some relief that applied to the future as well as past events, then that would, or might, have been binding on the parties, and the problem raised by the appeal would not have arisen. Waksman J made a similar point at [69]. That stance also informed Mr Nissen's answer when my lady, Lady Justice Andrews, put to him that Sudlows' claims in both Adjudications relied on a continuing breach by Global, and he said that "that was not how it was framed". In my view, that again seeks to elevate form over substance. It is not in accordance with the common sense and flexibility apparent from the authorities cited above. It ignores the reality of a case like this where everything was essentially agreed except one critical issue: whose fault was it?

78. As I have said, the substantive dispute between the parties in the present case was and remains the contractual responsibility for the cabling and ductwork issues. That did not change between Adjudication 5 and Adjudication 6. That issue was decided by Mr Curtis and cannot be re-adjudicated. The precise formulation of that dispute, either in the formal documents in the Adjudication 5 or 6, or in the Decisions themselves, may be of some relevance but it should not be allowed to obscure the reality of that which was being decided.

79. I accept that care is needed with the analysis in *Hyder* and that the search for "an essential component" of the first adjudicator's reasoning cannot become too granular. But no such difficulty arises here: if one stands back and considers the result in Adjudication 5 and the alternative result in Adjudication 6, it will be seen that they are irreconcilable; the adjudications produced, within a matter of months, two diametrically opposed decisions. That is because the alternative result in Adjudication 6 ignored the essential reasoning that explained the result in Adjudication 5. That can also be tested by assuming that Sudlows had *lost* in front of Mr Curtis; if so, they could never have then been able to claim the further extension in Adjudication 6. It would have been parasitic on an essential assumption as to contractual responsibility which had already been rejected. Two diametrically opposed results a few months apart are not in accordance with the principles of construction adjudication; they are instead a sign that something has gone wrong with the process (see paragraph 59 above).

b) The Fact that Different Periods of Time were Claimed

80. Mr Nissen's argument that a different extension of time was sought in Adjudication 6 (so there could not have been impermissible overlap) was a point that Waksman J relied on at various stages in his judgment. Moreover, I accept that, in most cases, a claim for an extension of time for period X will self-evidently be a different claim to a claim for an extension for period Y, in respect of which a second adjudicator will not be bound by a decision on the earlier claim (see for example *Lewisham*).

81. But this case is different, and makes such a distinction artificial. Here, although the period of the extension of time claimed in Adjudication 6 was obviously different to that which had been claimed in Adjudication 5, nothing else had changed. There were still no other competing Relevant Events, and no other matters said to be on the critical path. Importantly, during this second period, no further work was undertaken by Sudlows, just as no work had been done for much of the period that was the subject of Adjudication 5. Between 18 January and 7 June 2021 (the period covered by the claim in Adjudication 6), Sudlows remained doing nothing, waiting for the relevant instructions from Global. To use Mr Nissen's phrase, there was no "new narrative" at all.

82. Indeed, the only event of any relevance which occurred during this period was Adjudication 5 itself. Sudlows did not carry out any further work after 18 January or at any time before Practical Completion. Moreover, it was the result of Adjudication 5 – not the extension of time itself, but Mr Curtis' decision that the delays were Global's responsibility – that led to the certification of Practical Completion and brought to an end the total period of delay. Very unusually, the certification of Practical Completion here did not depend on the contractor's frantic attempts to finish the outstanding works on site. Instead, it was an entirely administrative act, resulting directly from Mr Curtis' Decision in Adjudication 5 and Global's subsequent removal of the energisation works from the scope of Sudlows' works.

83. In those circumstances, Sudlows were quite right to say that the delay claim in Adjudication 6 was the logical extension of the Decision in Adjudication 5. It was the remainder of the delay which had been triggered by the cabling and ductwork issues which Mr Curtis had decided were Global's contractual responsibility. "A logical extension" of a successful first claim will rarely be an accurate description of a second claimed extension of time for a different period, because of the almost inevitable factual

differences between the two claims. That is what the authorities show. But here it was an accurate description of the claim in Adjudication 6.

84. For completeness, I should say that this is also the answer to Mr Nissen's submission that the Relevant Events – namely, the acts of prevention – were of necessity different in Adjudication 6 from that relied on in Adjudication 5 because such acts have to be established for each day of delay as a matter of fact, and as a cause of delay. He contrasted that to a single Relevant Event which might be easy to identify, like a flood, and contrasted the need to show a continuing Relevant Event with, say, a single Specified Peril which would not need to be re-argued in a later adjudication. Those analogies may well have force in the majority of cases, but they do not apply here: as a result of Mr Curtis' Decision in Adjudication 5, the cabling and ductwork issues gave rise to a continuing breach on the part of Global which only ceased at Practical Completion.

85. Mr Nissen also submitted that the fact that there were two different extension of time claims was essentially the fault of Sudlows, because they had started Adjudication 5 in January. He said that, since they had not waited until Practical Completion, they could hardly complain that the two claims were different, and that an adjudicator the second time round was not bound by the decision of the first. But that counterfactual immediately runs up against the fact that the impasse had already gone on for over a year before Sudlows started Adjudication 5, without Global showing any inclination to resolve it themselves. It was only because Sudlows sought to resolve the impasse that, following Mr Curtis' decision, Global were obliged to omit the remaining works that were the subject of the cabling and ductwork issues, and certify Practical Completion.

86. So, on that basis, it was only because of Sudlows' decision to commence Adjudication 5 that the deadlock was broken at all. The cessation of the second period at Practical Completion, which itself had only been certified as the result of the decision in Adjudication 5, logically brought down the curtain on the claim which Mr Curtis had first considered and decided. Therefore, on these unusual facts, there is nothing in the point that the two extensions of time claimed were different and had been the subject of two different claims by Sudlows.

c) The New Evidence

87. The position seems to me to be this. If, as I have concluded, Mr Molloy was right, and he was not entitled to re-investigate the question of contractual responsibility for the cabling and ductwork issues, then the new evidence was irrelevant and inadmissible in Adjudication 6. It went to an entirely different matter, namely a challenge to the Decision of Mr Curtis as to contractual responsibility, and that could only be made in court proceedings or in arbitration. There is a difference in principle between, on the one hand, the dispute between the parties, and on the other, the evidence that each choose to deploy in seeking a favourable answer to that dispute (see *Carillion Construction v Smith* at [56]).

88. On that basis, it is unnecessary to consider the new evidence. But I cannot leave the subject without observing that, in my judgment, the impact of that new evidence has been over-stated by Global. If the two short reports from RINA dealing with the fact of the testing and reenergisation in August 2021 "compelled a different result", as Mr Nissen submitted, then in Adjudication 6, Global would not have burdened Mr Molloy

with the reams of evidence already deployed (and rejected) in Adjudication 5, and would instead have concentrated their fire in a few crisp paragraphs, relying on the new RINA reports.

89. In my judgment, they did not do so because they recognised that the new RINA material was simply a development of the old. Mr Evans of RINA had always said that, in his view, there was nothing significantly wrong with the ductwork. This was simply further evidence supporting that submission. It might be new, and it was not available before, but it did not go to a new issue or give rise to any new line of investigation.

90. I do not consider that there is anything in the point that, at the time that Adjudication 5 was launched, the project was still ongoing and that, if Sudlows had waited, the result would have encompassed the later RINA reports and would therefore have been as per Mr Molloy's alternative Decision. The project was not ongoing at the time of Adjudication 5; indeed, it took the result in Adjudication 5 to 'unfreeze' the project and lead to the administrative decision to issue the Practical Completion certificate. Moreover, there was no need for Sudlows to wait; they were entitled to adjudicate at any time.

9.3 Other Matters

91. Finally, I ought to address three other submissions made by Mr Nissen.

92. First, he criticised Mr Curtis for miscategorising one of the disputes between the parties arising in connection with the impasse between the parties in 2020-2021. He said, by reference to paragraph 13.289 of his Decision, that Mr Curtis described this as relating to the installation of the cables whereas, on Global's case, it was concerned with Sudlow's alleged refusal to facilitate others to carry out the work of testing and re-energisation.

93. I do not consider that this point takes Mr Nissen anywhere. The correspondence which we were shown demonstrates that Global would not pay for this facilitation, stating that they regarded it as being within Sudlow's work scope, whilst Sudlows maintained it was a change under the contract that required to be paid for. That means that this was simply another aspect of the underlying dispute which Mr Curtis decided: who was contractually responsible for the cabling and ductwork issues? In any event, as Mr Nissen fairly accepted, even if Mr Curtis had made an error of fact, that could not affect either the legitimacy or the enforceability of his Decision in Adjudication 5: see *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522. So even if it was an error (and I make no such finding to that effect), Global were stuck with it until there was a challenge in court or in arbitration.

94. Secondly, Mr Nissen argued that, by reference to clause 2.25.5, the contract administrator had an obligation to review extensions of time after practical completion, and that therefore the fact of a review, of the sort undertaken by Mr Molloy, cannot be described as a surprise to the parties. He noted that *Essential Living (Greenwich) Ltd v Elements (Europe) Ltd* [2022] EWHC 1400 was authority for the proposition that an earlier adjudication decision about a claim for an extension of time does not bind the adjudicator considering a dispute arising out of the post-completion review, pursuant to an equivalent contractual provision.

95. There are a number of difficulties with this submission. As Mr Nissen rightly accepted, this was not a point addressed in the judgment, and there is no Respondent's Notice. More importantly, perhaps, he also accepted that there had never been a review under clause 2.25.5, and it appears that the time for seeking such a review expired in August 2021. In any event, the contract administrator had the discretion ("may") to undertake such a review but he was not obliged to do so. Since the review never happened, it is something of a red herring. Furthermore, such a review could not have taken away extensions of time previously granted. Given what I have already said about the extension of time in Adjudication 6 being the logical continuation of the previous extension, that may have precluded any review under clause 2.25.5 arriving at a conclusion in line with the alternative decision in Adjudication 6 in any event.

96. Thirdly, Mr Nissen argued that the claim for loss and expense in Adjudication 6, which had never been made before, was a new claim and Mr Molloy was not bound by anything that Mr Curtis had decided. That is right up to a point, but it does not appear to me to trespass on the issues in this appeal. Mr Molloy decided the loss and expense due in consequence of Mr Curtis' extension of time up to January, and no issue on this appeal arises in respect of that analysis. As to the period thereafter, if I am right that the extension of time from January to June was the logical continuation of the Decision in Adjudication 5, then that too would carry the usual cost consequences. In other words, it was a simple quantification of the binding earlier decision on liability. That did not preclude arguments as to the figures themselves, and those were properly addressed by Mr Molloy.

10. Summary

97. For those reasons, paying what I hope is proper tribute to Mr Nissen's submissions in support of Waksman J's judgment, I am bound to conclude that the judge was wrong and that Mr Molloy's analysis was correct: he was bound by the decision in Adjudication 5. In those circumstances, I would allow the appeal, and reinstate the decision of Mr Molloy in favour of Sudlows in the sum of £996,898.24.

98. Finally, I should bring the wheel full circle, and come back to the principal purpose of construction adjudication noted in Section 7.2 above: to improve cashflow in appropriate cases, by adopting the mantra of 'pay now, argue later'. Global clearly wish to argue about their contractual responsibility for the cabling and ductwork issues, and they are quite entitled to do so. But they must do that later, in court or arbitration. In the meantime, in accordance with the binding Decision in Adjudication 5, and the primary finding of Mr Molloy in Adjudication 6, I consider that they must pay now.

LADY JUSTICE ANDREWS:

99. I agree that the appeal should be allowed for the reasons given by Coulson LJ. Whilst deferring to my Lord's great expertise in this field, I must confess that I did not find the issue to be as finely balanced as he did. To my mind there was no doubt on which side of the line this case fell, and Mr Stewart's submissions were plainly right. Mr Molloy correctly discerned in Adjudication 6 that Global were seeking, illegitimately, to re-open the key issue of contractual responsibility for the delays to the installation and energisation which had been decided against them in Adjudication 5. The proper remedy for their dissatisfaction with Mr Curtis's decision was to go to court or arbitration.

LADY JUSTICE ELISABETH LAING:

100. I agree with the judgment of Coulson LJ.