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Dispatch

Serial adjudications & the same dispute

Sudlows Ltd v Global Switch Estates 1 Ltd

[2023] EWCA Civ 813

This issue here was that the adjudicator in adjudication number 6 decided that he was bound by the findings in adjudication number 5, which meant that Global were contractually liable for what were termed as "the cabling and ductwork issues", and should, as a consequence, pay Sudlows just under £1 million. However, if he had not been bound, the second adjudicator had also said that, based on the information in adjudication 6, he would have come to a different conclusion on the issue of contractual liability, with the result that Sudlows would have had to pay Global in excess of £200k. At first instance, 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 appealed.

Adjudication 5 concerned Sudlows' claim for an extension of time ("EOT"). The critical issue 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. The only issue was which party was contractually responsible for the cabling and ductwork. Having found that Global were responsible, the adjudicator held that Sudlows were entitled to an EOT of 482 days.

In Adjudication 6, described as the continuation of the delay assessed in Adjudication 5 flowing from the cabling and ductwork issues, Sudlows sought an additional EOT of 133 days. The Referral also contained a full loss and expense claim, amounting to just over £12 million.

Global "made no bones" about their dissatisfaction with the previous decision and relied on all the evidence that they had unsuccessfully relied on before. Global also relied on two further short reports which Global said demonstrated that there was nothing wrong (and had never been anything wrong) with the ductwork. The Judge below, noted the "dramatic" effect of the new material on the second adjudicator. The Judge also said that the fact that both adjudications dealt with the same Relevant Event was "plainly insufficient" to mean that, in both adjudications, the dispute was the same or substantially so. They related to underlying EOTs for different periods of time, and there were new materials, which were not, and could not have been, part of the dispute leading to the prior adjudication.

Coulson LJ noted that 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. He said: *"Put more shortly, it is harder to adhere to the principle of 'pay now, argue later' when you are constantly arguing now."* 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. The Judge thought that there were three over-arching principles to be applied when considering arguments of overlap.

(i) 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.

(ii) You need to look at what the first adjudicator actually decided to see if the second adjudicator has impinged on the earlier decision. What matters is what it was, in reality, that the adjudicator decided. It is that which cannot be re-adjudicated.

(iii) There is a 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, but to ensure that what is essentially a new claim, or a new defence, is not shut out. The re-adjudication 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.

Here, Global said that Adjudication 6 concerned a fresh claim for an EOT and an entirely new claim for loss and expense. Coulson LJ noted that the second adjudicator had looked at what had been decided in the previous adjudication, including the essential finding as to Global's contractual responsibility for the cabling and ductwork issues. As this 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. Coulson LJ noted that, on the critical issue of overlap, it was: *"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."*

This was a very unusual delay case. Typically, arguments about delay range across the alleged effects of different competing Relevant Events and the consequences of different critical path analyses. But that was not the case here. In both adjudications, it was agreed that there was only one cause of the relevant delay. The first adjudicator's 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.

It was not correct to suggest that the only binding element of the first Decision was the 482 day EOT award and nothing else. That ignored the reality of the decision in Adjudication 5.

The fact that a different EOT period was claimed in the second adjudication did not make a difference. Nothing else had changed. There were still no other competing Relevant Events, and no other matters said to be on the critical path. There was no "new narrative" at all.

If the second adjudicator was correct to say that 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. It went to an entirely different matter, namely a challenge to the earlier decision. That could only be made in court proceedings or in arbitration. If Global wanted to argue about their contractual responsibility for the cabling and ductwork issues, then they were entitled to do so; but they had to do this later, in court or arbitration.

Adjudication: size of the Referral, natural justice & sampling

Home Group Ltd v MPS Housing Ltd

[2023] EWHC 1946 (TCC)

Home sought summary enforcement of an adjudication decision of some £6.6million. This adjudication followed an earlier one which held that MPS had repudiated the Contract.

The Referral, served on 17 March 2023, included a quantum expert report of 155 pages, with 76 appendices, which comprised 202 files in 11 sub-folders, amounting to 338 megabytes of data and a further 2,325 files in 327 sub-folders and five factual witness statements (which amounted to 88 pages, with hundreds of exhibited pages sitting behind). MPS had 19 days (or 13 working days) to produce its response to the Referral. It claimed at the time, and now, that this was an inadequate period of time. MPS said that it was unable to properly digest and respond to the material served with the Referral and that this was a breach of natural justice which led to a material difference in the outcome, and that, as such, the Decision was unenforceable. MPS said that Home should simply have provided MPS with a greater opportunity to understand the claim, whether in advance of the Notice of Adjudication or by agreeing to an extended timetable in the adjudication.

Mr Justice Constable noted that MPS "rightly" did not press a submission that the dispute was intrinsically so complicated or heavy that, in no circumstances, could it have been subjected to adjudication. Such a contention would, in any event, have failed. The relevant issue where the adjudicator had considered the position, but expressed the clear ability to render a fair decision, would inevitably centre upon the timing of the provision of the material to the responding party, and its ability to fairly put its case, rather than the complexity of the material.

The Judge noted that the authorities demonstrate that arguments based upon time constraints impacting the ability to respond fairly have enjoyed little success. Both complexity and constraint of time to respond were inherent in the process of adjudication and are no bar in themselves to adjudication enforcement. Whilst it was conceivable that a combination of the two might give rise to a valid challenge, where an adjudicator has given proper consideration at each stage to these issues and concluded that they can render a decision which delivers broad justice between the parties, the court will be extremely reticent to conclude otherwise. Further:
"In cases involving significant amounts of data, an adjudicator is entitled to proceed by way of spot checks and/or sampling. The assessment of how this should be carried out is a matter of substantive determination by the adjudicator and an argument that the adjudicator has erred in his or her approach, absent some particular and material related transgression of natural justice, will not give rise to a valid basis to challenge enforcement. It would, even if correct, merely be an error like any other error which will not ordinarily affect enforcement."

There was a question over whether the volume of material served with the Referral would fill 7 or 32 standard boxes. The Judge noted that, regardless, the quantity of information itself did not present a valid basis for challenging enforcement. Further: *"in the modern day, conceptualising the extent of electronic data by what it would look like printed will rarely be particularly persuasive or helpful, particularly so where a large quantity of the 'documentation' is in spreadsheets which are not designed to be printed."*

The real complaint was that Home unreasonably refused to provide MPS with data or access to the underlying documents until the last moment and that, in light of the absence of the documents and lack of time, MPS and its expert were unable to fairly interrogate and respond to the material in the Referral. These submissions were without merit and it was "never realistic" to insist, particularly in the context of an imminent adjudication, that it would be necessary to provide detailed information on each and every line item, and to use this as a reason not to engage in any analysis of the material provided on a sampling basis. When a draft report was provided, MPS could and should have been actively engaged in analysing the material including the underlying material to which they had been offered access.

In the view of the Judge, had MPS responded by reserving its position in the first instance on the nature and extent of sampling but still requested access to review the underlying records, it would have been extremely difficult for Home reasonably to refuse. That had not happened, and it appeared that MPS' responses leading up to the adjudication were strategically driven in an attempt to create a jurisdictional challenge that no dispute had crystallised.

Further, MPS had produced a comprehensive response which provided a clear agenda for determination of the dispute. MPS said that there was an absence of substantiation, and the adjudicator, in some circumstances, accepted this. That did not readily sit well with a submission now that MPS was materially prejudiced in its response. In the time available, MPS was able to identify significant areas of dispute and advance arguments based upon a sample of the material which drew attention to what it said were significant deficiencies in the claims. The Judge's review of the material suggested that MPS were able to, and did, properly and thoroughly engage in the substance of the claim, and indeed, enjoyed relatively significant success in undermining a number of high value aspects of the claim.

The Judge, accordingly, rejected MPS' submission that by reason of the volume of material, constraints of time, and access to material, (whether taken separately or in aggregate), there had been any, or any material, breach of natural justice.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN