



Are reasons separate from the decision of an adjudicator? Enforcing adjudication determinations

Global Switch Estates v Sudlows

By Belinda Green

Can a subsequent adjudicator disagree with the grounds on which an extension of time has been awarded in a prior adjudication, as long as they uphold the extension itself? In a somewhat surprising decision, *Global Switch v Sudlows* says no.

An adjudicator is bound by the determination of another adjudicator

There are some central tenets that we all know to be true: An adjudication determination is binding in the interim; it binds the parties unless and until the dispute is finally determined by arbitration or court proceedings (or agreement by the parties after determination); and it cannot be overturned by a subsequent adjudication.

But just how binding is an adjudicator's determination on a subsequent adjudicator? The courts are in agreement the *decision* is binding on the parties.¹ But the adjudicator's *reasoning* for that decision is not.²

This immediately raises the next question: What is the difference between the *decision* and the *reasoning*? The English courts tell us that the decision includes the essential components or basis of the decision. They also tell us that it is necessary to look at the terms, scope and extent of the decision, not just the adjudication notice.

So far, so good. But how does this play out in practice? The decision in *Global Switch Estates 1 Ltd v Sudlows Ltd* [2020] EWHC 3314 may surprise you.

¹ See, for example, *Balfour Beatty v Shepherd Construction Limited* [2009] EWHC 2218 (TCC).

² *Hyder Consulting (UK) Limited v Carillion Construction Limited* [2011] EWCA Civ 1231 (TCC) is often cited to support this principle, and the Court in *Sudlows* contains a discussion of some other precedents to support this position.



Global Switch v Sudlows

Sudlows was engaged by Global Switch under a JCT Design and Build 2011 contract to fit out and upgrade a data centre in London. During the course of the contract, the parties went to adjudication four times. The first three were with the same adjudicator, but the fourth was dealt with by someone else.

First adjudicator's decision: extension of time

An early adjudication related to an application for extension of time. The first adjudicator found that Sudlows was entitled to an extension of 292 days:

- 81 days were for additional strip-out works, which the adjudicator thought were a 'change' and therefore a 'relevant event' under the terms of the JCT contract.
- 211 days for structural enhancement works, which the adjudicator thought were instructed pursuant to an undefined provisional sum and therefore a 'relevant event'.

The first adjudicator therefore extended the completion date for that section by 292 days, updated the completion date for that section to be 14 August 2019, and confirmed that the liquidated damages period would only commence from that updated completion date.

Second adjudicator's decision: value of delays

Later on in the project, Sudlows submitted interim applications for payments. Global Switch disputed the values claimed, and this became the subject of a further adjudication between the parties. A different adjudicator was appointed. He was asked to consider *the value of loss and/or expense (in relation to delay for which extensions of time have been awarded, both under the contract and by way of adjudication)*.

The second adjudicator accepted that he could not award any more days for extensions

of time (those could be raised in a subsequent adjudication, but were outside the jurisdiction of the current case before him). He also accepted that he could not amend or adjust the 292 days figure, or the revised completion date (or period for liquidated damages). However, in making his determination on the value of the interim payments, the adjudicator reached a different conclusion on the contractual status of the additional strip-out works and the structural enhancement works. This led him to conclude that they were not 'relevant events'.

Sudlows challenged the determination of the second adjudicator. The main grounds for challenge were jurisdictional.³ However, one of the arguments raised was around the bindingness or otherwise of the first adjudicator's determination on the second adjudicator: Was it open for the second adjudicator to take a different view about the contractual status of the works? Or was this unfairly trespassing on the earlier decision?

High Court finding

The High Court thought that the second adjudicator was within his rights to make conclusions about the status of the works. The Court characterised the first adjudicator's decision as being one about an entitlement to extensions of time. As a part of that determination, the adjudicator decided that Sudlows was entitled to an extension of 292 days; that the completion date for the main works was extended to 14 August 2019; and that Global Switch was entitled to liquidated damages for the period beyond 14 August 2019 until the date of practical completion.

By contrast, the second adjudicator's decision was about the value of any compensation that Sudlows might be entitled to in respect of those extensions of time. The fact that the first adjudicator had decided on an extension of 292 days because he thought there were 'relevant events' under the contract was not part of his decision, and so it was open for the second adjudicator to reach a different conclusion. The Court said: *Those were findings that he was entitled to make on the evidence before him, including the expert evidence.*

³ The Court considered questions around how much the notice of adjudication restricted the scope of an adjudicator's jurisdiction, and whether there was a difference between raising a new issue or raising a defence to the existing issue. A similar issue has recently been discussed by our own New Zealand High Court, in *Alaska Construction + Interiors Auckland Limited v Lahatte & Anor* [2020] NZHC 1056 – one of our other contributors has written on this topic (see article 'What sets jurisdiction in construction disputes?' by Janine Stewart and Mariam Baho on page 15).



Where to from here?

The result in *Global Switch v Sudlows* is likely to be surprising. The valuation implications from this decision are clear, as meaningful evaluation of the delay costs becomes difficult if a subsequent adjudicator can make different conclusions as to the contractual status of the works. If the reason that an extension of time is granted is because of the status of the works, then surely the status of the works should be an 'essential component' of the decision? The High Court did not address this point, resolving the issue in a mere four short

paragraphs.

Whether or not you agree with the Court, there is some practical advice that we can take from this decision. Parties to an adjudication may wish to be clear in their notice of adjudication about the relief they are seeking. For example, by requesting a declaration that the event relied upon to claim the extension of time is a 'relevant event'. Adjudicators may also wish to adopt some language in their determinations that makes it clear which elements of the determination are 'essential components'.

ABOUT THE AUTHOR



Belinda is a solicitor in NZDRC's KnowHow Team.*

She has over 16 years' experience, working in both private and government sectors.

Belinda has recently joined us from the Parliamentary Counsel Office where she drafted commercial legislation, and prior to that she practised as a commercial property lawyer.

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