

# KEEP CALM AND CARRY ON

English Court of Appeal overturns controversial High Court ruling and clarifies guiding principles in serial adjudications.

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The English High Court caused concern earlier this year when it held that an adjudicator had breached natural justice by holding himself bound by a previous adjudicator's findings. Now, in *Sudlows Ltd v Global Estates 1 Limited*,<sup>1</sup> the Court of Appeal has put the lid back on the worm can by overturning that decision. The Court of Appeal also set out welcome guidance for parties, practitioners and adjudicators on the sticky area of serial adjudications.

**Introduction:**  
***Sudlows v Global* serial adjudication saga**

*Sudlows Ltd v Global Switch*

*Estates 1 Ltd* is the latest episode in a series of adjudications and court enforcements between an employer (**Global**) and an electrical contractor (**Sudlows**).<sup>2</sup>

Global entered a £14.8 million contract with Sudlows to carry out extensive electrical works at its London premises, including building a new electricity substation and installing high voltage cables (**Contract**).

<sup>1</sup> *Sudlows Ltd v Global Estates 1 Limited* [2023] EWCA 813.

<sup>2</sup> We previously covered a previous and separate High Court decision about an earlier episode in the *Sudlows v Global* adjudication series in *issue 42 of BuildLaw*.



*“It is harder to adhere to the principle of 'pay now, argue later' when you are constantly arguing now”.*

## English Court of Appeal overturns controversial High Court ruling.

→ The English Court of Appeal overturned a controversial High Court decision about an adjudicator's jurisdictional ruling, and provided a helpful summary of guiding principles about the binding effect of previous adjudication decisions on subsequent disputes.



The Contract has been beset by disputes. This article concerns Adjudications 5 and 6, which both concerned disputes over costs and delays caused by ductwork and cabling issues.

### The “pay now argue later” principle and the rule against re-adjudication

Section 108 of England and Wales' [Housing Grants, Construction and Regeneration Act 1996](#) allows a party to a construction contract to refer any dispute arising under the contract to adjudication. The adjudicator's decision is binding on the parties until the dispute is finally determined by legal proceedings, arbitration or by the parties' agreement.

This “pay now argue later” regime seeks to provide a quick, temporarily binding answer to construction disputes which each party must comply with in order to maintain cash flow and keep projects moving forward rather than grinding to a halt. If a party disagrees with the adjudication outcome, they have to ‘pay up and put up’ for the time being, and challenge it later in court or arbitration.

But in some projects, the disputes just keep happening, leading to multiple adjudications about the same contract. In these ‘serial adjudications’, the facts and issues in a later dispute may overlap with those of an earlier dispute, requiring the later adjudicator to determine

whether they are bound by the earlier findings.

In *Sudlows v Global*, the Court of Appeal succinctly observed the incongruity of serial adjudications with the purpose of construction adjudication, observing that *it is harder to adhere to the principle of ‘pay now, argue later’ when you are constantly arguing now.*<sup>3</sup>

The rule against re-adjudication provides that a later adjudicator cannot decide a dispute which is *the same or substantially the same* as a dispute that has already been decided in a previous adjudication.<sup>4</sup> Whether one dispute is substantially the same as another dispute is a *question of fact and degree.*<sup>5</sup>

3 *Sudlows* (EWCA), above n 1, at [33].

4 Paragraph 9(2) of the [Scheme for Construction Contracts \(England and Wales\) Regulations 1998](#).

5 *Quietfield Ltd v Vascroft Construction Ltd* [2006] EWCA Civ 1737 at [47].

## Background – the ductwork and cabling issues

Under the Contract, Sudlows needed to install high voltage cables running from one side of Global's premises to the other, across a main road. To enable this, Global had to install ductwork underneath the road. After Global completed the ductwork, Sudlows supplied and installed the cables and pulled them through the ductwork. However, one of the cables was damaged in the process.

Sudlows claimed that the cable had been damaged because the ductwork that Global had installed was defective and not fit for purpose. Sudlows refused to perform rectification works, or any other further works, unless Global paid for it.

Global denied there was anything wrong with its ductwork and claimed that the cable damage was caused either by defects in the cable that Sudlows had supplied or because of the way that Sudlows had installed the cables. Global claimed Sudlows was responsible for the delays and should pay for the rectification works at its own cost.

Global eventually engaged a different contractor to install new cables and run them through the ductwork. Global then instructed Sudlows to connect the new cables to the electrical system and energise them. Sudlows refused on the basis that the new cables were different to the cables Sudlows had selected and the installation method was unknown to Sudlows.

Sudlows applied for an

extension of time (EOT) due to the delays caused by these ductwork and cabling issues. Global refused to grant the EOT or to accept responsibility for the cable damage, and claimed that Sudlows was responsible and unreasonably refusing to connect and energise the new cables.

## Adjudication 5: First EOT – cable installation and energisation delays

The dispute was referred to adjudication. The parties agreed that the ductwork and cabling issue was the reason for the delays.

The main question to be decided was whose fault the cable damage was – did it

happen because Global's ductwork was defective, or had Sudlows damaged the cable themselves during the installation? This question was the focus of extensive factual and evidential investigation involving multiple expert technical witnesses.

The first adjudicator found in Sudlows' favour and granted the first EOT. He found that Sudlows had not damaged the cable and that the way Sudlows had pulled the cables through the ductwork was adequate based on the information Global had given it.

On the technical evidence before him, he found that Global's ductwork was defective and not fit for purpose and this had caused the damage to

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the cable, therefore Global was responsible for the delays. As a corollary, Sudlows' refusal to energise the new cables was reasonable.

### **Aftermath of Adjudication 5: Further cable energisation and testing delays**

Having lost Adjudication 5, Global had to engage another contractor to test and energise the new cables. This caused further delay to Sudlows' practical completion. During this testing, Global obtained new evidence from the certification company which showed there had been nothing defective about its ductwork.

Sudlows sought a further EOT for the delays to practical completion while the testing and energisation work was being carried out by the third party contractor. Sudlows claimed this was a continuation of the delays due to the ductwork and cabling issues, which Adjudication 5 had already determined was Global's fault. Sudlows also submitted a £12 million loss and expense claim.

Global refused to grant the further EOT and voiced its disagreement with the outcome of Adjudication 5. It said the adjudicator had been wrong to find that Global's ductwork was defective and should not have granted Sudlows the first EOT. This latest dispute led to Adjudication 6.

### **Adjudication 6: Further EOT for the flow-on delays**

Adjudication 6 was different to the Adjudication 5 dispute because it concerned a new application for a further EOT in respect of a different time period, as well as the wider issue of the new loss and expense claim.

However, there was an overlapping issue about who had been responsible for the ductwork and cabling issues that caused the delays. This had been determined in Adjudication 5 as being Global's fault. Sudlows argued that a natural extension of that earlier finding was that Sudlows was now entitled to a further extension of time for the continuing delays.

Global accepted it was bound by the first EOT decision in Adjudication 5. However, in defending against this new further EOT claim, Global led the new technical certification evidence it had obtained which showed that its ductwork was not defective and therefore it was not responsible for the delay in respect of the further EOT.

Faced with disagreement between the parties on whether he was bound by the earlier adjudicator's findings, the adjudicator in Adjudication 6 (**later adjudicator**) obtained the parties' consent to provide his decision with findings in the alternative – an “if I am wrong” decision.

*Adjudication 6: Primary decision*

The later adjudicator found that he was bound by the Adjudication 5 findings that Global was to blame for the ductwork and cabling issues. On that basis, he found that Sudlows were correct and entitled to refuse to energise the new cables and that Global was responsible for any delays that had flowed from this issue. He granted Sudlows the further EOT and just under £1 million.

Referring to the ruling in *Carillion*, he reasoned that he was bound by the earlier finding on the overlapping issue because it was an essential component or basis of the earlier adjudicator's reasoning.<sup>6</sup>

#### *Adjudication 6: Alternative finding*

In his alternative finding, he said that if he was not bound by the earlier adjudicator's findings, then based on the merits of the evidence before him (particularly Global's new expert evidence about the ductwork), his finding would be that Sudlows had been responsible for the ductwork and cabling issues rather than Global, and therefore also that Sudlows' refusal to energise the cables was unreasonable.

Under this alternative decision, Sudlows would not be entitled to the further EOT and would have to pay Global over £200,000.

### **High Court enforces the adjudicator's alternative findings in favour of Global**

Sudlows applied to the High Court to enforce the primary decision

<sup>6</sup> *Hyder Consulting v Carillion* [2011] EWHC 1810.

in Adjudication 6, which was in its favour.<sup>7</sup> Global resisted the enforcement on the basis that the later adjudicator had breached natural justice by wrongfully taking too narrow a view of his own jurisdiction and holding himself bound by the first adjudicator's findings.

The High Court agreed with Global. It held the two disputes were not substantially the same due to the different circumstances and evidence. Adjudication 6 concerned an EOT for a different period of time and involved new and different evidence which was not in existence at the time of Adjudication 5.

It held that the later adjudicator had been wrong to find he was bound by the earlier findings and

therefore his primary decision should not be enforced. Instead, the Court enforced his alternative findings in favour of Global.

Sudlows appealed the High Court's decision to the Court of Appeal.

### **Court of Appeal: Overturns High Court's decision and sets out guiding principles**

The Court of Appeal overturned the High Court's ruling and reinstated the adjudicator's primary decision in favour of Sudlows. Although it acknowledged that this case was finely balanced, it made clear that the High Court's decision was plainly wrong.

### **Serial adjudication principles**

The Court of Appeal took the opportunity to set out three *crystal*

*clear* overarching principles from the caselaw on jurisdiction and overlapping issues in serial adjudications.

As a general rule of thumb, the later decision should not lead to a result which would be fundamentally incompatible with the result of the earlier adjudication.

*Principle 1: Purpose, speed, (temporary) finality and reality.* The need for speed and the importance of temporary finality in adjudication means that subsequent adjudicators and courts faced with overlapping issues should take a robust and commonsense approach, not a complex analysis of circumstances, evidence and interpretations of case law.

The *reality* of the earlier

<sup>7</sup> *Sudlows Ltd v Global Switch Estates 1 Ltd* [2022] EWHC 3319.

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adjudication decision is more important than the form and content of the narrow 'decision' itself.

*Principle 2: Flexibility, common sense and fairness.* Quietfield's question of 'fact and degree' approach requires balancing, on a case by case basis, between preventing readjudication and not shutting out new claims or new defences. The answer should be the product of common sense and fairness.

*Principle 3: Non-interference.* Whether a later adjudicator is bound by previous findings on overlapping issues is a question to be determined by the later adjudicator. Courts should not interfere with that adjudicator's jurisdiction decision unless it is clearly wrong.

### Court of Appeal's reasoning

- The High Court's ruling fell foul of the principles above and the purpose of construction adjudication, which is to provide a quick, temporary answer which 'holds the ring' until a dispute is determined by court proceedings or arbitration.
- The High Court had wrongly interfered with the later adjudicator's view that he was bound by the previous findings. There was nothing about the adjudicator's reasoning or finding on jurisdiction that was clearly wrong to justify judicial interference.
- The overlapping issue of who was responsible for the ductwork and cabling issues which led

to the delays was clearly an essential component or basis of the earlier adjudicator's reasoning (following **Carillion**).

- The High Court's ruling that the later adjudicator was not bound by the earlier adjudicator's view on the overlapping issue ignored that essential component and produced a result which was fundamentally incompatible with the earlier adjudication decision.
- The fact that the two disputes related to EOTs for different time periods was an artificial distinction in the circumstances. Although the period was different to the previous dispute, nothing else had changed and there was no new narrative or new reasons for the further delay.
- The fact that new evidence had come into existence was irrelevant to whether the two disputes were substantially similar. There is a difference between a 'dispute' and the evidence which a party leads to support their position in that dispute.
- The earlier adjudicator had taken the view that Global was

responsible for the cabling and ductwork issues, so the later adjudicator was not entitled to re-investigate that. Therefore, the new evidence about the ductwork was irrelevant and inadmissible.

- Even if the new evidence clearly showed that the earlier adjudicator had made an error of fact about the ductwork, Global was stuck with it and their only remedy was to challenge it in court or arbitration.

### Conclusion

The High Court's judgment had been met with concern among construction adjudication practitioners. It had been criticised for causing uncertainty, risking undermining the adjudication scheme, encouraging repeated challenges and generally being a backwards step for the industry.

The Court of Appeal's decision to overturn that ruling will come as a welcome relief, and the rules and principles set out in this judgment provide welcome clarity and guidance for parties, advisors and adjudicators on how to deal with overlapping issues in serial adjudications.

### About the author:

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