Adjudication Update

28 September 2023

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Pump Court

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Sudlows Limited v Global Switch Estates 1 Limited

[2022] EWHC 3319 (TCC)

Serial adjudications: the rules

A dispute cannot be referred to adjudication where it is the same or substantially the same as one previously referred and decided upon

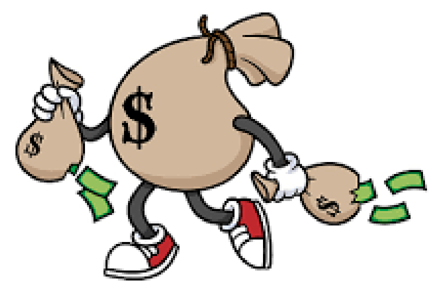
An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication (Scheme, para. 9(2))

The decision of an adjudicator is binding until the dispute is finally determined by legal proceedings, arbitration or the parties' agreement (HGCRA 1996, section 108(3)).

Serial adjudications: the rules

…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."

(Carillion Construction Limited v Davenport Royal Dockyard Limited [2005] EWCA Civ 1358)



"adjudication is intended to provide a speedy and proportionate temporary decision of disputes arising under construction contracts….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."

(Quietfield Limited v Vascroft Construction Limited [2007] BLR 67)

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Background to the dispute

JCT Design &Build M&E fit out contract for Global's data hall.

Dispute as to sectional completion and ductwork enabling works for the installation of new high voltage cables.

Global responsible for enabling works, whereas Sudlows was responsible for the cable installation.

Enabling works and Sudlows' refusal to terminate, connect and energise led to delay in the completion of the cabling works.

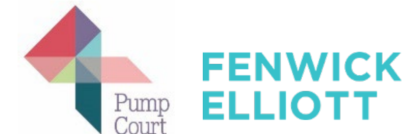
The fifth adjudication

- Sudlows claimed an extension of time for delays associated with the damaged cabling works.

The Adjudicator's Decision

- Sudlows was entitled to refuse to connect and energise the cable supply and therefore entitled to an EOT.
- Considered whether defective ducting and delays caused by taking the cable work out of the contractor's scope of work were "Relevant Events" as defined under the contract

The sixth adjudication



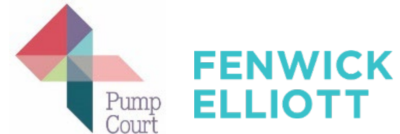
Sudlows…

- Sought a further EOT = "natural consequence
- Submitted that the sixth adjudicator was bound by the fifth adjudicator's decision in relation to the Relevant Events"

Global…

- Claimed the fifth adjudicator's findings as to the Relevant Events formed part of his <u>reasoning</u> but not his decision.
- Submitted the sixth adjudicator was not bound by fifth Adjudicator's decision.
- Submitted it was entitled to challenge and put in further evidence on the Relevant Events.

The sixth adjudication



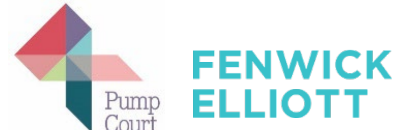
The Alternative Decision

- Parties agreed that in the event the sixth adjudicator were to decide that he was bound by Adjudication 5 in respect of the EOT sought, he should nevertheless go on to consider the position (and make alternative findings) as if he were not so bound.

- Permission not given however to:

> *"open up and re-decide what…has already been decided by Mr Curtis"*

The Adjudicator's Decision



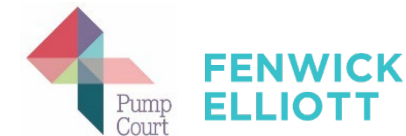
The Adjudicator's primary decision

- The Adjudicator was bound by the Relevant Events decided by the fifth Adjudicator as they formed an "essential component" of the EOT decision in the fifth adjudication.
- Sudlows was entitled to a further EOT.

The Adjudicator's alternative decision

- Adjudicator not bound by the fifth adjudicator's decision.
- The events in question were not Relevant Events.
- Global to be awarded £209,000

Enforcement



- The disputes in adjudication 5 and 6 were not the same or substantially the same
- The sixth adjudicator:
  - Was not bound by the fifth adjudicator's decision
  - Had taken a wrongfully narrow view of his own jurisdiction = breach of natural justice

Principal decision in the sixth adjudication could not be enforced, however…

The alternative decision was a "*very sensible approach*" and therefore enforceable

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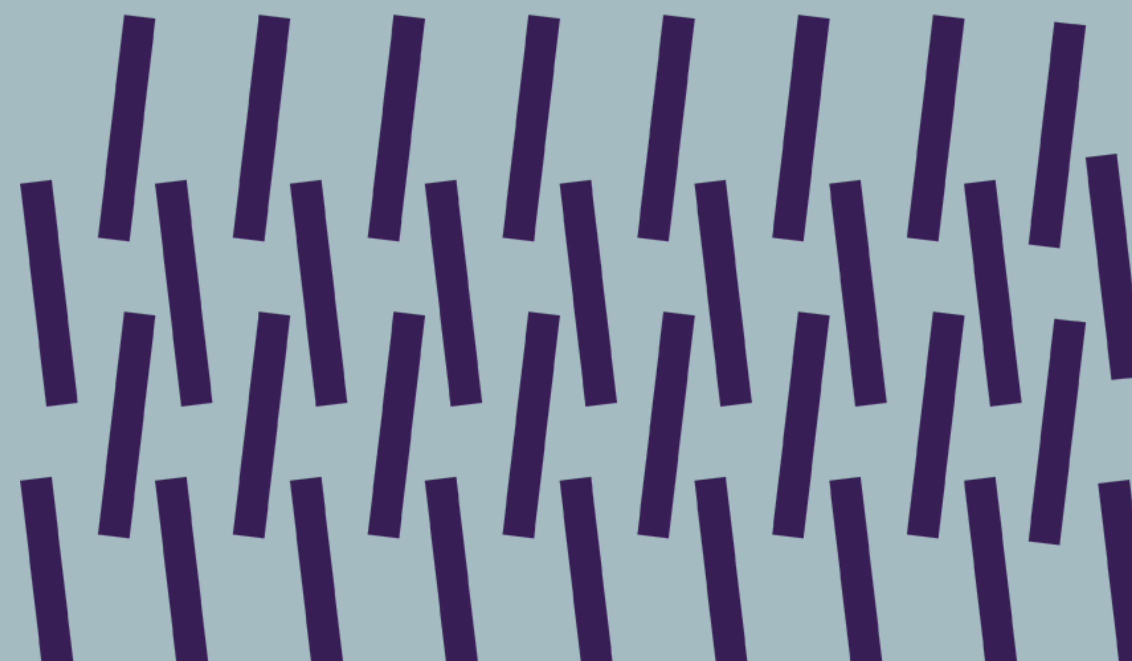
Sudlows v Global Switch 2023: Court of Appeal



Court of Appeal

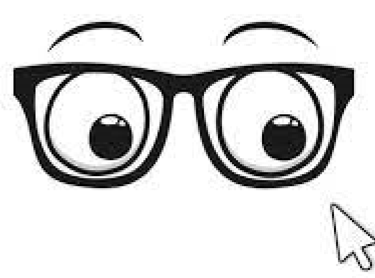
- The sixth adjudicator had been correct to find he was bound by the decision of the fifth adjudicator.
- Dispute in adjudication 5 was the same or substantially the same as the dispute referred in adjudication 6.
- Any other result would be "fundamentally inconsistent" with the binding decision of the fifth adjudicator.
- 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.
- If Global wanted to challenge that earlier decision it had every right to do so, but it had to go to court or arbitration.

Court of Appeal – Guidance (1)

- Purpose of construction adjudication not easy to reconcile with serial adjudications.
- The need for speed and the importance of at least temporary finality means that the adjudicator, and if necessary the court on enforcement, should be encouraged to give a **robust and common-sense answer** to the issue of overlap between decisions.
- It should **not be a complex question** of interpretation of documents and citation of authority.

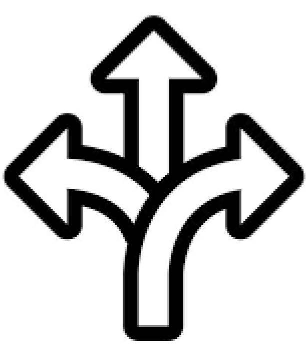
Court of Appeal – Guidance (2)

- It's all about the decision; and
- The need to look at what the first adjudicator **actually decided in reality** to see if the second adjudicator has impinged on the earlier decision.
- The form and content of the documentation provided to the adjudicator is of less relevance.

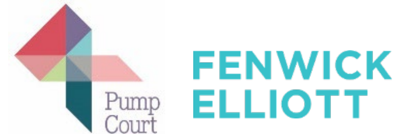


Court of Appeal – Guidance (3)

- There needs to be **flexibility** to prevent a party from re-adjudicating something on which it has unequivocally lost, but…
- …also ensuring that what is essentially a new claim or defence is not shut out.
- Test of fact and degree important.
- The result should be a product of common sense and fairness.



Court of Appeal – Guidance (4)



- 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.
- The parties cannot ask the second adjudicator to do something that is **diametrically opposed** to what the first adjudicator decided.
- Two diametrically opposed results a few months apart are not in accordance with the principles of construction adjudication but "a sign that something has gone wrong with the process".

Key points to note

Clear guidance from Court of Appeal.

Parties are to avoid re-packaging disputes in order to get another bite of the cherry.

What is the same or substantially the same is a matter of fairness and common-sense.

Court will be slow to interfere with an adjudicator's finding unless it can conclude the adjudicator was clearly wrong.

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Home Group Limited v MPS Housing Limited

[2023] EWHC 1946 (TCC)

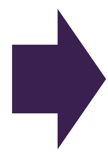
Background to the dispute

JCT Measured Term 2011 for emergency and maintenance works. Works were high volume but low value.

Prior adjudicator decided MPS had repudiated the contract. HG therefore south to recover the costs of repudiation by way of a second adjudication.

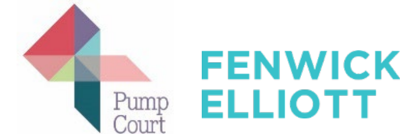
HG's Referral covered thousands of individual orders and a quantum report of 155 pages (draft report provided to MPS a month earlier).

MPS given 19 days to respond.



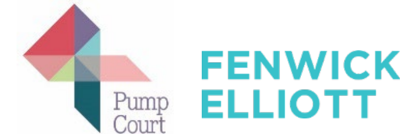
Adjudicator awarded HG c.£6.5m. MPS refused to pay.

Enforcement



- HG sought summary enforcement of the Decision.
- MPS sought to resist enforcement on the basis that:
  - The procedure giving rise to the decision was so unfair it constituted a breach of natural justice.
  - It had not had enough time to review the materials provided in the Referral.
  - There was no clear procedure by which the complex issues could be addressed within the prescribed timeframe.

Enforcement – judgment

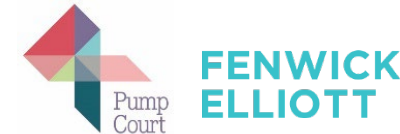


- Constable J upheld the Adjudicator's award in HG's favour on basis that:

The adjudicative system exists to find quick answers rather than the right answers (*Carillion v Devonport Royal Dockyard* [2005] EWCA 1358*)*

The mere fact an adjudication contains a significant volume of material is not of itself sufficient to establish a breach of natural justice.

Enforcement – judgment



- The inherent complexity of material will not be sufficient to produce a breach.
- The question is whether the adjudicator can appreciate the issues and submissions so as to do "broad justice to the parties" *(Amec Group Limited v Thames Water Utilities Limited* [2010] EWHC 419M (TCC)*).*
- Where an adjudicator can appreciate the issues so as to achieve broad justice, a court will be very slow to interfere with the decision.

How to “appreciate the issues”

Sampling is acceptable.

Not necessary to seek a “wholly unrealistic” and disproportionate situation.

Assessment is a matter of substantive determination by the adjudicator.

Errors will not ordinarily affect enforcement

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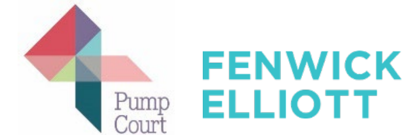
Sufficient time?



- Time constraint and complexity could in principle produce a breach of natural justice.
- To succeed a party needs to meet the test of materiality, i.e., that the breach has led to a material difference in the outcome.
- Time differences for submissions not sufficient.
- MPS defence could be dismissed as they:
  - *"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"*

ALEX HICKEY KC v SEAN BRANNIGAN KC

MEK MESFIN v SIMON HALE

(FK Construction v ISG)

Project Barberry

	Date	Decision
Shawer Decision	17 November 2022	FK's AfP 14 - £1.5m No valid PLN ISG must pay in full
Wood Decision	27 February 2023	FK's AfP 16 - £1.6m No valid PLN ISG must pay in full
Ribbands Decision	7 March 2023	FK's AfP 13 - £1.55m No valid PLN ISG must pay in full *if* Wood Decision is not satisfied
Molloy Decision	14 April 2023	True value assessment as at 28 Feb 2023 Net balance due to FK: £0.9m

Project Triathlon

	Date	Decision
Aeberli Decision	20 March 2023	ISG is entitled to terminate FK, and FK liable to pay ISG £763k
Ribbands Triathlon Decision	30 March 2023	ISG is entitled to payment from FK of £105k
Jensen Decision	5 April 2023	FK entitled to payment of £801k from ISG

ISG's attempted set-off

- FK seeks to enforce the Wood Decision.
- ISG agrees that the Wood Decision is enforceable, but asks the Court to set off:
  - the gross valuation of ISG's works per the Molloy Decision; and
  - the net sum of £66,620.68 due in respect of the Triathlon decisions.

The principles

- Joanna Smith J:
  - Adjudicators' decisions should be enforced, and generally no set-off between decisions is allowed (per Jackson J in *Interserve Industrial Services v Cleveland Bridge UK Ltd* [2006] EWHC 741 (TCC))
  - Subject to three exceptions:
    - Where there is a contractual right of set-off which is compliant with the policy of the HGCRA (rare – per Mantell LJ in *Ferson Contractors Ltd v Levolux AT Ltd* [2003] BLR 118)
    - Where it follows logically from the decision itself that the adjudicator has allowed a set-off against the sums found to be payable (*Balfour Beatty Construction v Serco Limited* [2004] EWHC 3336 (TCC) per Jackson J)
    - Subject to the Court's discretion, where there are two valid and enforceable decisions involving the same parties (*HS Works Ltd v Enterprise Managed Services Ltd* [2009] EWHC 729 (TCC) per Akenhead J)

Applying the principles

- ISG sought to rely on the third exception. Akenhead J in HS Works says there are four conditions:
  - Court must determine that both decisions are "valid".
  - Court must determine that both decisions are capable of being enforced.
  - Court should then give effect to both decisions, provided that both parties have brought proceedings to enforce their decisions.
- Here, ISG fails at every hurdle:
  - Court not in a position to assess validity or enforceability of the Molloy Decision
  - And there are no extant proceedings in respect of the Molloy Decision

The Williamson proceedings

- 14 June 2023 Adrian Williamson KC handed down an unreported judgment in respect of a dispute between the same parties (approx six weeks after Smith J's judgment).

- In that judgment he determines that the Shawyer Decision was wrong on a point of principle:

  - FK's AfP 14 is issued a day late, but FK relies on a saving provision in the contract which says that late applications are valid, but that subsequent dates are adjusted accordingly.

    - Shawyer agreed, and held that FK's AfP 14 was a notice "*in accordance with the contract*" for the purposes of section 110B(4), so that it is treated as a payee's notice.

  - Williamson says no: AfP 14 may be "valid", but it is not "*in accordance with the contract*", and therefore not within 110B(4).

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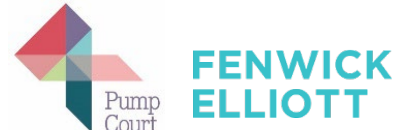
The second Williamson judgment

- In the meantime, ISG is seeking to enforce the Malloy Decision and recover the difference between the sum paid pursuant to the Wood Decision / Smith judgment and Molloy's valuation.
- After the first Williamson judgment, ISG amends its Particulars of Claim:
  - The Wood Decision was reached on the same basis as the Shawyer Decision.
  - So if Shawyer goes, Wood goes too.
  - And ISG is able to recover the *whole* of the Wood payment.

The second Williamson judgment

- FK's response:
  - Point 1:
    - ISG should try and correct the overpayment in the next payment cycle
  - Point 2:
    - Wood Decision was based on grounds which survive the first Williamson judgment
  - Point 3:
    - Yes the Wood Decision has been declared unenforceable
    - But that means that the Ribbands Decision kicks in, and ISG is required to pay the sum awarded in the Ribbands Decision

The second Williamson judgment



- Williamson says:
  - No, if monies are paid pursuant to a decision and that decision is knocked down, monies must be repaid.
  - Not open to FK to go fishing around for other decisions pursuant to which the same monies might be kept.

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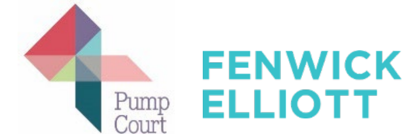
Lidl Great Britain Limited v Closed Circuit Cooling Limited

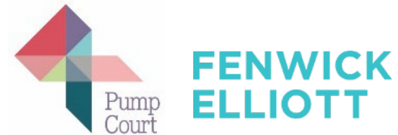
[2023] EWHC 2243 (TCC)

Facts



- Lidl loses an adjudication
- CCC issues proceedings to enforce the decision
- Lidl issues Part 8 proceedings seeking final determination of a point decided by the adjudicator:
  - The contract says that the final date for payment is linked to issue of a VAT invoice by CCC.
  - CCC has not yet issued any VAT invoice.
  - Therefore the final date for payment has not yet arrived.

Discussion



- Issue for the Court is whether it is permissible to link a final date for payment to an event, rather than a particular date, under section 110(1)(b) of the HGCRA:

110 Dates for payment.

(1) Every construction contract shall—

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and

(b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

Discussion

- Cockerill J had already decided *obiter* in Rochford Construction Limited v Kilhan Construction Limited [2020] EWHC 941 (TCC) that the final date for payment must be linked to the due date, not some other event.

- HHJ Davies agrees: the wording of section 110(1)(b):

  - allows the parties to decide the *period* between the due date and the final date for payment; but
  - not to insert any other event or circumstance that is needed in order to bring about the final date for payment.

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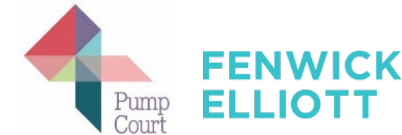
Henry Construction Projects Limited v Alu-Fix (UK) Limited

[2023] EWHC 2010 (TCC)

Facts

- Alu-Fix submits a payment application, with a payment due date of 13 December 2022. HCP issues a pay-less notice.
- Alu-Fix commences Adjudication 1, disputing validity of HCP's PLN.
- HCP commences a true value adjudication (Adjudication 2).
- **Then** Alu-Fix wins Adjudication.
- And the Adjudicator in Adjudication 2 (Molloy) stays that Adjudication.

Facts



- HCP then pays the sums due in respect of Adjudication 1.
- Molloy lifts the stay on Adjudication 2, and finds that Alu-Fix has been overpaid.
- Did Molloy have jurisdiction to make that decision?

Discussion

- The principles are (per O'Farrell J in *Bexheat v Essex Services Group* [2022] EWHC 936 (TCC):
  - "*Where a party is required to pay the 'notified sum' by reason of its failure to issue a valid Payment Notice or Pay Less Notice, such party is entitled to embark upon a 'true value' adjudication in respect of that sum but only after it has complied with its immediate payment obligation…*"
- HCP says:
  - Fine, but here there was a dispute as to whether its PLN was valid.
  - And that dispute had not been decided as at the start of the true value adjudication, so there was no "*immediate payment obligation*".

Discussion

- The Court says no:
  - The immediate payment obligation is that defined by the contract / the Scheme.
  - And not by the date for payment of any adjudicator's award.
  - Therefore Molloy had no jurisdiction in Adjudication 2.

- One small bit of hope for employers:

  "*Overall, in my view, the outcome in this case, whilst not closing the door on commencing a TVA prior to the outcome of an SGA and later relying upon the outcome, ought to discourage such a course in areas of spurious SGA dispute, but not deter those who have a sufficient level of confidence that any dispute raised should result in a finding of no immediate payment obligation having been established.*"

Thank you.
Questions?

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