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Claim Nos: HT-2022-000371
HT-2022-000403

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Date: 21 December 2022

B e f o r e :

MR JUSTICE WAKSMAN

SUDLOWS LIMITED

Claimant

- and -

GLOBAL SWITCH ESTATES 1 LIMITED

Defendant

Roger Stewart KC and George Mcdonald (instructed by Pinsent Masons LLP, Solicitors) for the Claimant
Alexander Nissen KC (instructed by Macfarlanes LLP, Solicitors) for the Defendant

JUDGMENT

Hearing date: 13 December 2022

INTRODUCTION

1. In this case, the contractor, Sudlows Ltd ("Sudlows") has brought a Part 7 claim against the employer, Global Switch Estates 1 Ltd ("Global") to enforce a decision of the adjudicator, Mr Molloy, dated 9 September 2022. The decision was that Global should pay Sudlows a total of £996,898.24 plus VAT. This was the 6th adjudication between these parties ("Adjudication 6"). Sudlows' present application is to obtain summary judgment against Global for the enforcement of that adjudication decision, in the usual way. This is resisted by Global.

2. Further, Global has brought Part 8 proceedings against Sudlows which have two parts. The first is for a declaration that, in making his decision, Mr Molloy acted in breach of natural justice. That is because he wrongly took too narrow a view of his own jurisdiction by holding that he was bound by certain findings (to put it neutrally) made by a different adjudicator, Mr Curtis, in the previous adjudication ("Adjudication 5"). This element of the Part 8 claim is the mirror image of Global's defence to Sudlows' application for summary judgment.

3. The second part of Global's Part 8 claim is to obtain enforcement of alternative findings (again to put it neutrally) made by Mr Molloy which are said to apply if he was wrong to hold that he was bound by Mr Curtis's decision in Adjudication 5. Here, he held that if he was wrong, his alternative decision, on the merits of the matters before him in Adjudication 6, was to the opposite effect i.e. it would not be in favour of Sudlows but rather Global, to the extent that Sudlows would now have to pay Global £209,053.01 plus VAT, interest and fees.

BACKGROUND

The Works

4. The underlying contract between Sudlows and Global was in JCT Design and Build 2011 form and dated 22 December 2017. The works as a whole were for the fit out of a data hall, installation of 5 chillers on the roof and provision of future infrastructure service connections for 8 new chillers at Global's premises at East India Docks House London E14 ("the Site"). The total contract sum was £14,829,738.

5. The work with which these proceedings are concerned related to what is known as Section 2 of the sectional completion. This involved, among other things, the creation of a new private electricity substation at the Site. Part of that operation involved getting new relevant high-voltage cables to the Site from another part of Global's premises on the other side of the main road which divided them. That, in turn, required the creation of ductwork under the road and into the Site.

6. The ductwork, which constituted enabling works, was constructed by or at the instruction of Global. It should have been completed by February 2018, when Sudlows was due to start work, but in fact this did not happen until 28 May 2019. Sudlows then started to install the cables on that date. When Sudlows pulled the heavy cables through the ductwork on 21 June 2019, one of the cables was damaged. At the time, Sudlows said that this was due to the defective nature of the ductwork and that it had been provided with misleading information about the line level and gradient thereof.

7. Another set of cables was duly provided and pulled through in the summer of 2020 by a different contractor. However, Sudlows then refused, it was alleged, to terminate, connect and

then energise, i.e. put power into, those cables. There is a dispute as to what, precisely, Sudlows was asked and not asked to do at this point, but it does not matter for present purposes.

8. The result of Sudlows' refusal, right or wrong, was an ongoing delay in the completion of the cabling work and thus the enablement of the power to be supplied to the Site.

Adjudication 5

9. On 18 January 2021, Sudlows applied for an adjudication, the point of which was to decide whether it was entitled to an extension of time ("EOT") for what is known as Window 29 which was that part of Section 2 which ran from 29 May 2020 to 18 January 2021. Sudlows had sought that EOT from Global which had refused to grant it. Paragraph 5 of its Adjudication Notice provided that:

> "5.1 A dispute has arisen between the Parties in relation to Sudlows' entitlement to an Extension of Time to the Completion Date for Section 2 in respect of delays **up to 18 January 2021.**
>
> 5.2 This Adjudication is concerned only with delays caused to the Completion Date for the Section 2 Works and only in respect of delays occurring **up to 18 January.**"

10. This was the sole subject matter of Adjudication 5.

11. In order to justify the EOT, Sudlows had to show that there had been a Relevant Event or Events as defined by the contract. Those relied upon here were at paragraphs 2.26.1 and 2.26.6 as follows:

> "Changes and any other matters or instructions which under these Conditions are to be treated as, or as requiring, a Change" (Clause 2.26.1); and
>
> "any impediment, prevention or default, whether by act or omission, by the Employer or any of the Employer's Persons…" (Clause 2.26.6).

12. While dealing with the contract, I should also refer to the definition of Relevant Matters as follows:

> "Changes and any other matters or instructions which under these Conditions are to be treated as, or as requiring, a Change" (Clause 4.21.1); and
>
> "any impediment, prevention or default, whether by act or omission, by the Employer or any of the Employer's Persons…" (Clause 4.21.5).

13. Paragraph 9 of Sudlows' referral in Adjudication 5 read as follows:

> "**9. ENTITLEMENT TO EXTENSION OF TIME: RELEVANT EVENTS**
>
> 9.1. The causes of the further delay to the Completion of the Section 2 Works during Windows 14 to 29, as outlined above, constitute Relevant Events in accordance with clause 2.26 of the Contract.
>
> **9.2 The defective HV-B ductwork provided by Global Switch**
>
> 9.2.1 The defective HV-B ductwork provided by Global Switch is a Relevant Event pursuant to clause 2.26.1 and/or clause 2.26.6, as follows.
>
> 9.2.2 Global Switch's failure to complete its enabling works in respect of the underground duct network between the LON (E) building and the LON (N) building prior to Sudlows commencing works on site and Global Switch's subsequent failure to complete such works timeously following Sudlows commencing works on site…is a Relevant Event…
>
> 9.2.3 Global Switch's failure to complete its enabling works in respect of the underground duct network between the LON (N) building and the EPC and Global Switch's subsequent

instructions to Sudlows to undertake the works in place of its enabling contractor…is a Relevant Event…

9.2.4 The defective duct network provided by Global Switch, Global Switch'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 duct network provided by Global Switch and Global Switch's failure to instruct Sudlows accordingly, once Sudlows had evidenced the defective nature of Global Switch's duct network…constitutes a Relevant Event…

9.2.5 Global Switch's removal of the HV-B cable installation works from Sudlows' scope of works and its instruction to others to carry out those works in place of Sudlows and Global Switch's refusal to take responsibility for the novel and untested installation undertaken on its behalf, thus preventing Sudlows from completing its works and achieving Practical Completion…is a Relevant Event…"

14. All of this was heavily contested by Global and there was substantial expert and factual evidence adduced, along with many submissions.

15. Mr Curtis issued his decision on 17 May 2021. It ran to 82 pages. His findings included the following:

"12.29 Scope of Sudlows' EOT claim in this Adjudication.
12.30 The dispute Section 2 Works only
12.31 The relevant time window concerns the period from 3 March 2019 to 18 January 2021.

13.185 My conclusions in this section are that:
(a) Sudlows have provided sufficient technical evidence to prove their allegation that Global/JMS HV duct network was defective and not fit for purpose.
(b) Global are culpable for the resulting delays resulting from their defective duct network.

13.207 My conclusion is that:
(a) Global were entitled to take the HV-B cable installation out of Sudlows' scope of works.
(b) However Global had taken responsibility for the performance of the cable and any contractual impact on the Contract Date and potential EOT to Sudlows that might flow from it.

13.229 Taking all of the above factors into consideration, my conclusions are that:
(a) The primary cause of the damage to the HV cables was Global's defective duct network.
(b) Global were ultimately responsible for the defective duct network and hence liable for any resultant delays to the Completion Date.

13.283 Global position is:
(e) Sudlows are being unreasonable in their refusal to terminate the HV cables and to energise the works.
.

13.289 My conclusions are that under the circumstances:
(a) Sudlows were correct and entitled to refuse to connect and energise the HV supply provided by Global.
(b) Global are culpable for any delays that flow from this issue.
(c) Sudlows are therefore entitled to an EOT for any delays that may occur the to Completion Date.

14.108 Window 29 (29A and 29B) (29 May 2020 to 18 January 2021)…

14.125 Adjudicator's conclusions upon EOT in this window

14.126 I have already concluded earlier in this Decision that Global are culpable for the delay events covered in this window and that Sudlows are therefore entitled to an EOT.

14.127 Both Mr Hudson and Mr Bahl agree that the delays total 234 days.

14.128 My conclusion is that Sudlows are entitled to an EOT of 234 days.

14.129 Adjudicator's conclusions on Sudlows' total EOT entitlements.

14.130 Sudlows total EOT entitlement accumulated across Windows 14 to 29 is as follows:

(a) Windows 14 to 17 22 days
(b) Windows 18 to 21 82 days
(c) Windows 21 to 28 144 days
(d) Window 29 234 days
(e) Total EOT 482 days

14.131 My conclusions are that:
(a) Sudlows are entitled to an EOT of 482 days.
(b) With the above EOT the Completion Date for the Section 2 Works should now be revised from 14 August 2019 to 8 December 2020.

14.136 My conclusions are that Global are not entitled to withhold or deduct LAD from Sudlows for the delays to the completion of the Section 2 Works in respect of the period up to 8 December 2020."

16. The formal Decision section is at Section 16. Paragraph 16.3 reads as follows:

"16.3 Sudlows seeks decision and/or declarations from the Adjudicator that:
(a) Sudlows is entitled to an additional extension of time to the Completion Date for the Section 2 Works of 509 days, or such other period as the Adjudicator shall decide, in respect of delays between 3 March 2019 and 18 January 2021;

My Decision is that Sudlows are entitled to an additional extension of time to the Completion Date for the Section 2 Works of 482 days.
(b) the Completion Date for the Section 2 Works is thus 4 January 2021, or such other date as the Adjudicator shall decide;

My Decision is that the Completion Date for the Section 2 Works is 8 December 2020.
(c) Global Switch is not entitled to withhold or deduct any liquidated damages in respect of Section 2 in respect of the period up to 4 January 2021, as referred to in paragraph 16.3(b) above (alternatively in respect of the period up to such other revised Completion Date as the Adjudicator shall decide)

My Decision is that Global Switch is not entitled to withhold or deduct any liquidated damages in respect of Section 2 in respect of the period up to 8 December 2020.
and
(d) Global Switch shall pay the Adjudicator's reasonable fees and/or expenses in this Adjudication.

My decision is that:
Sudlows shall pay £4,790.27 plus VAT
and
Global shall pay £85,592.23 plus VAT…"

17. It can be seen from this decision that the Relevant Events found by Mr Curtis were the defective ducting, Global being responsible for any delays by taking the new cable out of Sudlows' scope of work and Sudlows being entitled to refuse to terminate, and energise the new cables.

Adjudication 6

18. Following the issue of Mr Curtis' Decision, Global Switch omitted the energisation from Sudlows' scope of work and certified practical completion as being achieved on 7 June 2021. The cable was successfully tested on 18 August 2021 and energised on 19 August 2021.

19. Thereafter, Sudlows sought from Global a further and final EOT from 19 January 2021 to 7 June 2021, the date of practical completion, together with further payments pursuant to Interim Payment Application 46. Global refused both.

20. Sudlows' notice of adjudication included the following:

> "5.1 Sudlows seeks decisions and/or declarations from the Adjudicator that:
>
> 5.1.1 Sudlows is entitled to additional extensions of time as follows: …
>
> (b) 133 days in respect of Section 2 (A04 Main Fit-Out Works), or such other periods as the Adjudicator decides;…
>
> 5.1.3 Global Switch's entitlement to withhold or deduct any liquidated damages is limited as follows: …
>
> (b) £nil in relation to Section 2, or such other amount as the Adjudicator Decides…"

21. As to the 133 days EOT in respect of Section 2, Sudlows relied on the same Relevant Events it had relied on in Adjudication 5, and on Mr Curtis's findings in respect thereof. At paragraph 11.166.5 of its Referral, Sudlows contended that the "natural consequence" of Mr Curtis's decision in Adjudication 5 was the grant of the further 133 days EOT now being sought. Its core argument was that nothing material had changed after 18 January 2021. On that footing, it contended in Adjudication 6 that Mr Molloy was bound by Mr Curtis's decision as to the operative Relevant Events so that, when dealing with the application for the further EOT, he was effectively bound to grant it.

22. Section 13 of Sudlows' Referral contained its full loss and expense claim. This came to just over £12 million in respect of Section 2. The claim for loss and expense depended on showing Relevant Matters which were to the same effect as Relevant Events, at least for present purposes (see paragraph 12 above). All these claims were set out in a table at paragraph 13.10. They included Relevant Matters in respect of Window 29 (i.e. the period before Mr Curtis) and Window 29+ (i.e. that now before Mr Molloy).

23. For its part, Global did not seek to challenge Mr Curtis's decision as to the particular EOT he had awarded. Nor did it say that there were new or different causes of delay for the period after 18 January 2021, and I accept that there were none. However, what it did say was that Mr Curtis's finding as to whether certain facts gave rise to a Relevant Event forms part of his reasoning, but not part of his decision. Global later addressed the merits in respect of the claim for the further EOT and loss and expense, by reference to the existence or otherwise of the claimed Relevant Events and Relevant Matters. Here, it went on to say that it was entitled to challenge, and put in further evidence on, the Relevant Events relied upon by Sudlows for the purpose, and only for the purpose of resisting the further EOT (and consequent claims for prolongation costs) now before Mr Molloy. This further evidence consisted of two reports by the certification company RINA dated 20 and 26 August 2021. The first dealt with short-circuit

calculations for the new cables, required before they could be energised, and the second dealt with the successful testing which took place on 18 August 2021.

24. On loss and expense specifically, Global argued that when no EOT had yet been sought, it should not now be granted, and on that basis, loss and expense for those periods could not be payable. There were in fact EOTs sought for some earlier periods in the contractual works as well as for the final 133 days. Global also argued that even if the adjudicator was bound to award the further 133 days EOT, this did not prevent it from challenging the Relevant Matters necessary for the loss and expense claim for Windows 29 and 29+. Other points on loss and expense were also taken.

25. In response, Sudlows said that the new evidence was irrelevant since Global was bound by Adjudication 5 but that in any event, the fact of the test and the two reports did not take matters any further.

26. Confronted with these positions, Mr Molloy took what might be thought to have been a very sensible approach. By an email dated 3 August 2022, he asked the parties to confirm if they would like him to consider alternative positions in connection with the extent to which he was bound by Decision 5, saying:

> …2. The parties are to confirm by the end of next week whether they would like me to consider alternative positions in connection with the extent to which I am bound by Mr Curtis' findings regarding Relevant Event in Window 29."

Global Switch did not provide confirmation of their position in respect of paragraph 2. However, Sudlows responded by letter dated 11 August 2022:

> "Sudlows' response to the question posed in item 2 of your email dated 3 August 2022 is in line with its submissions as outlined above. Plainly, it is a matter for you but, as noted above, Sudlows recognises the difficulty faced by you in respect of this matter and appreciates that it may assist both you and the Parties if you were to consider alternative positions in respect of the issue. Accordingly, and without affording you any jurisdiction to do so, Sudlows accepts that it may assist the Parties if, in the event that you agree with Sudlows that you are bound by Mr Curtis' findings regarding Relevant Events in Window 29, you should nevertheless go on to consider the position as if you were not bound by those findings. Sudlows therefore invites you to proceed on that basis (again, however, making it clear that Sudlows makes no concessions regarding your jurisdiction to do so)."
>
> For the avoidance of any doubt, we confirm that Sudlows does not submit to your jurisdiction to open up and re-decide what, in Sudlows' submissions, has already been decided by Mr Curtis".

27. Mr Molloy issued his decision on 9 September 2022. Under the heading "Nature of the Dispute" he said this:

> "4. The dispute concerns the amounts due following Sudlows' interim application for payment No.46 ("IAP46") which included claims for additional extensions of time and additional payment. Sudlows claims that it is entitled to additional extensions of time of 211 days in respect of Section 1 (Chiller Replacement Works) and 133 days in respect of Section 2 (A04 Main Fit-Out Works). At the close of submissions, but prior to an update to its interest and financing calculations, Sudlows contends that the gross valuation of the Works is £33,294,3852 and that, after taking into account retention (£284,043), the amount previously paid (£21,747,843), a call on the Bank Guarantee (£1,018,025.00), liquidated damages (£165,700.00) and interest awarded previously (£80,114), it is entitled to further payment of £12,034,711 plus interest.
>
> 5. Global Switch denies that Sudlows is entitled to any further extension of time, and claims it is entitled to liquidated damages of £478,023 in respect of Section 1 and £1,396,286 in respect of Section 2. Global Switch's position is that the correct gross valuation of the Works is £16,429,530, and taking into account retention (£385,337), the amount previously paid (£21,747,843), liquidated damages (£1,874,309) and

interest awarded previously (£80,114), Global Switch contends that Sudlows owes it £7,631,073. Thus the difference between the parties is £19,665,784."

28. He then said this about Mr Curtis's decision:

> "21. It is common ground that in Adjudication No.5 Mr Curtis decided that Sudlows was entitled to an extension of time to Section 2 as a result of delays associated with a failure to provide a network of cables which prevented energisation of the HV-B supply and that the delay continued until 18th January 2021, i.e. the end of "Window 29". Sudlows' position is that, as the effect of this event continued until after practical completion on 7th June 2021, the natural consequence and/or direct effect of Mr Curtis's decision is that it is entitled to a further extension of time of 133 days (given credit for 7 days of contract work).
>
> 22. Global Switch accepts that it is bound by Mr Curtis's decision in Adjudication No.5, but contends that it is not bound by the reasoning. Global Switch therefore says that I am unfettered by Mr Curtis's decision as to whether the events relied upon constitute a Relevant Event. Global Switch accepts that the extension of time sought by Sudlows for Section 2 is in large part based on the same or similar circumstances as for Window 29, but says that Mr Curtis's reasoning did not form an essential component of his Decision. Sudlows denies this and says that Mr Curtis's findings regarding Relevant Events are an integral and necessary part of his decision
>
> 23. Sudlows contends that Global Switch is attempting to re-argue the case which it lost in adjudication No.5, i.e. that Sudlows was responsible for the duct design and cable selection and that the cable installed by Sudlows was damaged as a result of poor workmanship on the part of Sudlows, as well as raising a new argument that, as the cable installed by Power Testing (Global Switch's alternative contractor) was successfully installed, the cable installation was satisfactory. Sudlows accepts that Global Switch now also seeks to rely on two further reports from RINA, prepared after Mr Curtis's Decision, in support of its contention that Sudlow's refusal to energise was unreasonable, but contends that it is not open for Global Switch to argue a matter which has already been determined in Sudlows' favour by Mr Curtis. Notwithstanding this, Sudlows also argues that the two further reports do not actually address the underlying issue which prevented Sudlows from energising, i.e. that Power Testing's installation was novel, untested and unverified.
>
> 24. At the meeting with the parties I confirmed that I would address the question of the extent to which I am bound by Mr Curtis's decision and set out my non-binding conclusion in my Decision. I also asked the parties whether they wished me to consider the alternative position to my conclusion, such that, in the event that it was found that my non-binding conclusion on jurisdiction was wrong, I would set out what effect that would have on my Decision. The rationale for this was that it would enable the parties and a Court to easily determine the effect on my Decision in the event my conclusion was found to be wrong by way of severance.
>
> 25. Under cover of Pinsent Masons' letter dated 11th August 2022, received in an email timed at 17:11hrs that day, Sudlows confirmed that, in the event that I decide that I am bound by Mr Curtis's reasons regarding the Relevant Events in relation to Section 2, I should also consider the position as if I was not bound, i.e. the Global Switch position. Sudlows made it clear that, in adopting this position, it was making no concessions regarding my jurisdiction to do so."

29. He then went on to consider the law, based on the submissions made to him and then concluded as follows:

> "40. The dispute which Mr Curtis decided in Adjudication No.5 required him to address the parties' arguments as to whether the delays encountered in Window 29 constituted a Relevant Event. Sudlows' position was that Global Switch's cable installation did not comply with its requirements, i.e. that it was defective, and that it was reasonable for it to refuse to terminate the HV-B cables and energise the works. Global Switch denied that its cable installation was defective and contended that Sudlows was unreasonable in refusing to terminate the cables and energise the works. In support of their positions, the parties relied upon the expert evidence of Mr Marshall of Synergy Consulting Engineers (Sudlows) and Mr Paton of HKA and Mr Evan of RINA (Global Switch). At paragraphs 13.287 and 13.288 of his Decision Mr Curtis made it clear that he preferred the evidence of Sudlows and the expert report of Mr Marshall.
> At paragraph 13.289 he concluded that:-

> "(a) Sudlows were correct and entitled to refuse to connect and energise the HV supply provided by Global [Switch].
>
> (b) Global [Switch]are culpable for any delays that flow from this issue.
>
> (c) Sudlows are therefore entitled to an EOT for any delays that may occur [to] the Completion Date."

> 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."

30. On the footing that he was bound by Mr Curtis's findings and reasons, as he put it, he said this at paragraphs 147-149.

> "147. It follows that I agree with Sudlows that the only items which were preventing Practical Completion were the energisation of the HV-B cable and the subsequent commissioning and technical cleaning activities. In terms of the extent of delay, Mr Hudson identifies that no progress was made during his Window 29+ i.e. from 18th January 2021 to 7th June 2021. This is a period of 140 calendar days. Mr Hudson explains that the forecast completion date at the end of Window 29 was 25th January 2021, which indicates that the outstanding work would have taken 7 days to complete. He therefore deducts the 7 days from the 140 calendar days to account for the work required once the HV-B cable had been terminated, which results in a further delay of 133 calendar days in Window 29+. I accept and adopt Mr Hudson's analysis of the critical delay which revises the Date for Completion from 8th December 2020 to 20th April 2021.
>
> **Section 2 (Alternative position)**
>
> 148. As set out above, I have reached the conclusion that the parties are bound by Mr Curtis's finding in Adjudication No.5 that the delays associated with Sudlows' refusal to facilitate the termination/connection, testing and energisation of the HV-B cable and complete the remaining work constituted a Relevant Event. However, for the reasons set out at paragraph 24, I will consider the effect on my conclusion in respect of Sudlows' claim Section 2 in the event that my conclusion on Adjudication No.5 is wrong.
>
> 149. For this exercise, it is necessary to address whether the delays complained of by Sudlows were caused by a Relevant Event and/or whether Sudlows is precluded from claiming an extension of time as a result of it causing or contributing to the delay."

31. What Mr Molloy then did in paragraphs 150-177 was to analyse the claimed Relevant Events. Paragraphs 151-158 set out the contractual background as he saw it. He then said that:

> "Sudlows says that Global Switch was aware that the ductwork was not fit for purpose and was not suitable for the original cable selected by Sudlows and its refusal to take responsibility for the installation and energise was entirely reasonable. Sudlows accepts that Global Switch was subsequently able to energise the cables, but says that this does not address the situation Sudlows faced at the time when Global Switch was insisting that Sudlows should energise a novel, untested and unverified installation in the absence of any further data as to the characteristics of the installation."

32. He then addressed further contractual matters. Then, at paragraphs 166 and 167 he said:

> "166. The central issues between the parties are essentially (i) the extent to which the problems encountered by Sudlows in installing the Cabelte HV-B cables in May/June 2019 and September 2019 are attributable to either party, and (ii) whether Sudlows was justified in refusing to facilitate the installation of replacement Energya cable by Power Testing in August 2020.

167. Although Sudlows had a duty to coordinate its work with JMS's work, there is no warranty in relation to JMS's work. Similarly, although it is evident that Sudlows was aware of the development of JMS's design and its departure from the planned intent, I do not accept that this means that Sudlows can be held responsible for any defects in JMS's work. The evidence indicates that Sudlows' selection of the Cabelte cable and PMI-052 was to meet the cable duct route design. The question then arises whether the fact the cables became damaged was attributable to the unsuitability of Sudlows' cable or underlying defects in JMS's duct design/installation."

33. Paragraphs 168 and 169 dealt with the differing cables used. It is then necessary for me to quote all of paragraphs 170-178:

"170. The replacement cable proposed and installed by Power Testing between 5th and 9th August 2020 was an Energya copper single core cable which was smaller in diameter than the Cabelte cable installed by Sudlows, but provided the same load carrying capacities. Global Switch says that this cable was selected as it was more suited to the ducts installed due to its greater flexibility. Global Switch says that, in contrast to Sudlows, Power Testing did adopt good industry practice and did not compromise the minimum bending radius of the Energya cable. Consequently, Global Switch says that this is the main reason why the installation was successful as evidenced by the energisation of the HV-B cable following the omission of Sudlows' remaining works by way of PMI-066.

171. In support of its position Global Switch relies on two further reports prepared by RINA (referred to as the fourth and fifth RINA reports) prepared in August 2021 and shared with Sudlows on 8th September 2021. These reports confirmed that the testing undertaken demonstrated that none of the calculated forces would be expected to be hazardous to the cable and that the cable could be safely energised. Subsequently the cable was energised on 19th August 2021 with no reported problems since.

172. Sudlows says that the only reason Power Testing's installation was successful was because Global Switch relaxed its specification to allow a change of configuration (i.e. six smaller single-core cables in pairs rather than two "triplex" cables) which was entirely novel and non-compliant. Sudlows says that, as this methodology was entirely unknown to it, it was entirely reasonable to refuse to take responsibility for it and/or to agree to energise the HV-B cable. Sudlows denies that the fourth and fifth RINA reports undermine its position, and says that its refusal to energise was due to the unknown characteristics of the installation and not because the characteristics were unacceptable per se. Sudlows says that the reports were prepared with the
benefit of hindsight and fail to address the situation Sudlows faced at the time.

173. Global Switch makes the point that it was not asking Sudlows to take responsibility for the Power Testing installation/the Energya cable or to terminate or energise the cable, but merely to facilitate the termination and energise of the cable. Global Switch also makes the point that, to the extent the characteristics were "unknowable", they could have been confirmed by testing, measurement and calculations after termination/connection as has now been done by the fourth and fifth RINA reports. These points are well made.

174. In my view the most compelling evidence regarding the adequacy of the duct installation by JMS and the cable installation by Power Testing is the successful energisation of the cable on 19th August 2021 and the absence of reported problems since.

175. Although there was an issue regarding the extent to which the installation was to comply with UKPN requirements, it is evident that Sudlows was aware of the duct design developed by JMS and approved by Global Switch and selected a cable which was based on that design. Although there is some evidence of issues with the ductwork installation, the fact that the ductwork installation was not altered prior to the installation of the Energya cable indicates to me 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. As Sudlows bears the contractual responsibility for the selection of the cable and its installation, it follows that the instruction to remove and replace the cable does not result in a Change.

176. Turning to the question of Sudlows' refusal to facilitate the termination/connection and energisation of the HV-Cable, although I accept that the fourth and fifth RINA reports were prepared after the date when the work was omitted from Sudlows' scope of work, in conjunction with the fact that the HV-B

> cable was successfully energised, the reports support a finding that the ducts and the cable were fit for purpose. In such circumstances, notwithstanding that such a finding is made with the benefit of hindsight, I conclude that the refusal to facilitate the termination/connection and energisation of the HV-Cable was unreasonable. It follows that I do not accept that there has been an act of prevention on the part of Global Switch regarding the cable installation by Power Testing.
>
> 177. In conclusion, in the event that it is found that I am not bound by Mr Curtis's findings regarding the issues concerning the duct installation by JMS and cable installation by Power Testing constituting a Relevant Event, I would have concluded that Sudlows was not entitled a further extension of time in respect of Section 2. I would have also found that the revised Date for Completion would be 8th December 2020 in line with extension of time awarded in Adjudication No.5.
>
> **Conclusion**
>
> 178. It follows that Sudlows is entitled to a further extension of time of 23 calendar days to 30th July 2018 in respect of Section 1 and 133 calendar days to 20th April 2021 in respect of Section 2. This also results in a revised Date for Completion for the Works overall of 20th April 2021. In the event that my conclusion that the parties are bound by Mr Curtis's finding in Adjudication No.5 that the delays associated with Sudlows' refusal to facilitate the termination/connection, testing and energisation of the HV-B cable and complete the remaining work constituted a Relevant Event is found to be wrong, then it follows that Sudlows would not be entitled to a further extension of time in respect of Section 1 and that the Date for Completion of the Works would be 8th December 2020."

34. At paragraph 179, he awarded the further EOT, including the 133 days for Window 29+. Going forwards, for every material finding affected by the question as to whether he was bound by Mr Curtis's decision, he gave his detailed alternative findings. At paragraphs 307-309, he set out the EOT and prolongation costs on the primary position, but said that these would be disallowed if he was wrong to say he was bound by the earlier decision. It is important to note here that the only prolongation costs disallowed were in respect of Window 29+, in the sum of £117,893.93. He did not alter the outcome in respect of Window 29. Further alternative findings appear at (among other places) paragraphs 312, 313, and 318-321. In relation to the relevant interest claim, again, while Mr Molloy's alternative finding changes the interest figure, this was again only in respect of Window 29+, not Window 29. This can be seen by reference to the fraction used of 774/907 which represents a difference of 133 days. At paragraph 325 he set out the total valuation of the works including prolongation costs of £1.909 million and at paragraph 326, there is the alternative valuation with reduced prolongation costs of £1.791 million. Again, when dealing with liquidated damages, Mr Molloy did not award liquidated damages for Window 29 but only Window 29+. He clearly took the view that as an EOT had been granted for the former, it would not be right to now permit liquidated damages for that same period; see paragraph 335.

35. Then, at paragraph 339, Mr Molloy set out his findings which led to the award of £996,898.24 in favour of Sudlows. But at paragraph 340, he gave his alternative calculation of £209,053.01 in favour of Global. At paragraph 341 he said that he found that Sudlows was entitled to the £996,898.24. At paragraph 342 and 343, he produced alternative interest calculations and at paragraphs 346 and 347, he did the same for the apportionment of his fees.

36. The Decision page itself set out only the primary findings, as it were.

THE ISSUES

37. The first issue is whether Mr Molloy was indeed bound by the decision in Adjudication 5 in the sense that he was bound to grant the further 133 days EOT (and with it the claimed prolongation and other costs) which would flow if the Relevant Events found by Mr Curtis

continued to apply. If he was so bound, he obviously could not take account of the new evidence or indeed assess the matter differently. If he was not bound, he could. I refer to this as the Prior Decision Issue.

38. It is now common ground between the parties that if I were to resolve the Prior Decision Issue in favour of Global, Mr Molloy's wrongfully narrow view of his own jurisdiction would constitute a breach of natural justice such that his primary decision could not be enforced.

39. Further, if Mr Molloy was not bound, the question is then whether Global can rely on the detailed alternative findings he produced so as to lead to an enforceable award in its favour for the £209,053.01 and further sums. I refer to this as the Alternative Finding Issue.

THE PRIOR DECISION ISSUE

The Law

40. I refer first to the following provisions of, and underlying, the Scheme. Section 108(3) of the 1996 Act provides that a compliant construction contract shall provide:

> ". . . that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration . . . or by agreement."

41. Paragraph 23(2) of the Scheme reproduces the substance of this subsection.

42. Paragraph 9(2) of the Scheme provides:

> "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."

43. Paragraph 9(4) of the Scheme provides:

> "Where an adjudicator resigns in circumstances referred to in para (2), or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, the adjudicator shall be entitled to payment of . . . [reasonable fees and expenses]"

44. As to this, in *Balfour Beatty v Shepherd Construction Ltd* [2009] EWHC 2218 (TCC) Akenhead J stated at paragraph 41of his judgment that:

> "… once an adjudicator has decided the first dispute, that dispute cannot be referred to adjudication again because it has already been resolved. The second adjudicator must be astute to see that he or she decides nothing to override or undermine the first adjudicator's decision; jurisdictionally, a later adjudicator's decision cannot override an earlier valid adjudicator's decision. The later adjudication decision may be wholly or partly unenforceable if materially it purports to decide something which has already been effectively and validly adjudicated upon."

45. This shows that the issue may not only, indeed may not usually, arise where the adjudicator is actually required to resign at the outset of the later adjudication because they are bound by the earlier, although there are cases where the later adjudication is paused after commencement to enable the Court to pronounce upon the matter and then remit back, if appropriate.

46. The usual context is enforcement and/or a Part 8 claim brought by a party which contends that the adjudicator did not have jurisdiction to decide what he did, because it was already decided in the earlier adjudication.

47. The subject of when and the extent to which a later adjudicator may indeed be bound by a decision of an earlier adjudicator has arisen in a large number of cases. However, for present purposes, I need only refer to a few of them.

48. First, the relevant principles have been summarised by the Court of Appeal in the judgment of Simon LJ in *Brown v Complete Building Solutions Ltd* [2016] EWHC Civ 1 as follows:

> "20. 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 paragraph 34, adopting the summary set out by Ramsay J in HG Construction Ltd v Ashwell Homes (East Anglia) Ltd [2007] EWHC 144 (TCC) at paragraph 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."
>
> 21. The reference to "fact and degree" derives from the observations of Dyson LJ in Quietfield Ltd v Vascroft Construction Ltd [2006] EWCA Civ 1737; [2007] BLR 67.
>
> > "45. Paragraph 9(2) 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. It must necessarily follow that the parties may not refer a dispute to adjudication in such circumstances.
> > 46. This is the mechanism that has been adopted to protect respondents from having to face the expense and trouble of successive adjudications on the same or substantially the same dispute. There is an analogy here, albeit an imperfect one, with the rules developed by the common law to prevent successive litigation over the same matter: see the discussion about Henderson v Henderson (1843) 3 Hare 100 abuse of process and cause of action and issue estoppel by Lord Bingham of Cornhill in Johnson v Gore Wood & Co (A Firm) [2002] 2 AC 1, 30H–31G.
> > 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.
> > 48. Where the only difference between disputes arising from the rejection of two successive applications for an extension of time is that the later application makes good shortcomings of the earlier application, an adjudicator will usually have little difficulty in deciding that the two disputes are substantially the same."…
>
> 23. As was made clear from the recent decision of this court in Matthew Harding (t/a M J Harding Contractors) v Paice [2015] EWCA Civ 1281; [2016] BLR 85, Jackson LJ at paragraph 57:
>
> > "It is quite clear from the authorities that one does not look at the dispute or dispute referred to

> the first adjudicator in isolation. One must look at what the first adjudicator actually decided. Ultimately it is what the first adjudicator decided which determines how much or how little remains for consideration by the second adjudicator."
>
> 24. The terms of paragraph 9(2), the approach in the Quietfield case of both May LJ at paragraph 32 and Dyson LJ at paragraph 48, and that of Jackson LJ in the Harding case at paragraph 57, indicate that the starting point is the Adjudicator's view of whether one dispute is the same or substantially the same. This has often been described (see for example in the Quietfield case at paragraph 47) as being "a question of fact and degree"; and it is important that the court gives due respect to the Adjudicator's decision, see for example, Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358, Chadwick LJ at paragraph 85."

49. It is then useful to provide a few examples of these principles in action. Thus, in *Quietfield* itself, the contractor had failed to establish an EOT in the earlier adjudication, the application for which was based on 2 letters outlining various events causing the delays in question. In the later adjudication, it was the employer who sought liquidated damages for the same period as the (failed) EOT application. Here, the contractor claimed the same EOT again, but now as a defence to the claim for liquidated damages. However, it now based the claim for the EOT on a document which identified a number of causes of delay which did not feature in the 2 letters. This was set out in a document called Appendix C. This was a structured and logical document which sought to demonstrate how particular events did or did not affect the final date for completion by reference to a critical path.

50. The Court of Appeal held that the dispute underlying the later adjudication was not the same or substantially the same as the earlier one, even though the issue in both concerned time and moreover the same time period. To use the language of Jackson J at first instance, Appendix C was a "far cry" from the 2 letters, and it was irrelevant that Appendix C had not been advanced in the earlier adjudication although it could have been.

51. I then turn to the decision of O'Farrell J in an earlier dispute between Sudlows and Global, this time concerning the 4th adjudication, namely *Global Switch Estates 1 Limited v Sudlows* [2020] EWHC 3314 (TCC). It arose in the context of Global's application for summary judgment to enforce that adjudication. There, the adjudication decision concerned the true value of part of the works. As part of that dispute, the adjudicator decided, and largely rejected, Sudlows' claim for loss and expense. He also awarded a net balance to be paid to Global by Sudlows, of just over £5 million. Enforcement of this was resisted by Sudlows on three grounds. O'Farrell J upheld the first ground of resistance so that the adjudication decision would not be enforced, but went on to deal with the second and third grounds as well.

52. As for the second ground of resistance, O'Farrell J held that had it been necessary to consider it, it would not have rendered the adjudication decision unenforceable.

53. As to the third ground, Sudlows submitted that the adjudicator had found that it had no right to an EOT and hence no right to any claim for loss and expense, yet its EOT had been upheld in the second adjudication. Accordingly, the adjudicator in the 4th adjudication had no jurisdiction to dismiss most of the loss and expense claim. O'Farrell J said that she would have rejected this third ground of resistance. First, the later adjudicator expressly stated that he was bound by the actual EOT granted earlier, which was for a period of 292 days. But that did not stop him from evaluating the loss and expense claim in its own right for the same period. What he had found here in fact was that most of it was not substantiated. So this was not a case where the adjudicator had "trespassed" on an earlier decision.

54. Finally, I deal with the case of *Hyder Consulting v Carillion* [2011] EWHC 1810. It was not, in fact, a case about whether a later adjudicator was bound by an earlier adjudication decision at all. It was about whether the adjudicator's methodology in calculating the target cost for the claimant design consultancy was permissible given that it differed from the formulations proffered by both parties. In other words, was there a breach of natural justice as against the paying party ie Carillion?

55. However, in the course of his judgment, Edwards Stuart J said this:

> "36. Since it is the decision of the adjudicator that is binding on the parties, not his reasoning, one must consider what is meant by "*the decision of the adjudicator*". In most cases the adjudicator will determine that a sum of money is due from one party to the other and the decision will therefore consist of a declaration that the particular sum is due, together with related declarations in relation to the amount of interest and questions of costs. In that type of decision, it is clear beyond doubt that the adjudicator's conclusion that A owes (and must pay) £X to B is binding until finally determined by litigation or arbitration.
>
> 37. However, suppose that the adjudicator's reason for deciding that the sum owed to B is £X is that he has decided that B was entitled to an extension of time of Y weeks with a weekly prolongation cost of £Z. In this situation, I find it difficult to see how it could be said that the amount of the extension of time to which B was found to be entitled was not also part of the decision and therefore not binding as between A and B (subject, of course, to B having the right to argue in a subsequent adjudication that he is entitled to a further extension of time on the grounds not put before the adjudicator in the first adjudication). In my judgment, in that situation an adjudicator's conclusion on the amount of the extension of time attributable to the stated events would also be binding on the parties (until finally determined otherwise).
>
> 38. Accordingly, I consider that an adjudicator's decision consists of (a) the actual award (i.e. that A is to pay £X to B) and (b) any other finding in relation to the rights of the parties that forms an essential component of or basis for that award (for example, in a decision awarding prolongation costs arising out of particular events, the amount of the extension of time to which the referring party was entitled in respect of those events)."

56. These are dicta upon which Sudlows relies here and to which reference has been made in a number of other cases.

57. However, first, the context is important. The contractor had claimed its fee based on its actual costs which were significantly less than the target cost as found by the adjudicator. The latter's figure was about £2 million higher than even the contractor's figure and much higher than Carillion's figure for the target costs. As a matter of contract, the contractor was also entitled to an uplift of 50% of the extent to which the actual costs fell below the target cost (the "gain" part of the pain/gain element of the contract) but it here only claimed its actual costs.

58. In the course of deciding whether the adjudicator had acted unfairly, Edwards Stuart J considered what the adjudicator had actually decided (and what he had not). That is how he came to state what he did in his paragraphs 36-38.

59. What he then did was to say that here, the adjudicator's decision was clear, because it was set out under the heading "Decision". Here he awarded the contractor its claimed fee. He had also concluded that since the fee claimed was less than the target cost, no further consideration needed to be given to the target cost. So, provided the target cost was at least £1 more than the fee claimed, its actual value was irrelevant for present purposes. So, therefore, the adjudicator's conclusion in relation to the <u>value</u> of the target cost was not binding on the parties going forward. Therefore, while there was nothing to stop the contractor from commencing a further

adjudication to claim the "gain" element based on the adjudicator's calculation of the target cost, equally, there was nothing to stop Carillion from disputing the correctness of it, since it formed no part of the present adjudicator's decision. That meant that there was no unfairness element in this regard. Edwards Stuart J then went on to hold that, in adopting the methodology which he did, the adjudicator was not otherwise acting in breach of natural justice.

60. So, in fact, using Edward Stuart J's own terminology, the finding of the target cost was not itself an essential component of the decision. I would also add that in the examples given by Edward Stuart J in paragraph 37 of his judgment, the key "essential component" he was considering was the amount of the EOT.

61. So I think that one has to read paragraph 38 of his judgment in its particular context and I doubt in practice whether it adds to the principles which I have already referred to and as set out in the later cases and which are directly concerned with where a later adjudicator may be bound by earlier adjudicator's decision. It is in those cases where a comparison between the two decisions has to be made.

Analysis

62. I start first with Adjudication 6. As described by Mr Molloy at paragraphs 4 and 5 of his decision (see paragraph 27 above), this was Sudlows' application for payment pursuant to its Interim Payment Application number 46. This involved assessing the gross valuation of the work now completed which included claims for further EOT's including the 133 days in respect of Window 29+ of Section 2, and additional payments. Sudlows contended that the gross value was £33.294 million.

63. As for Global, it contended that the gross value was £16.429 million. It denied that Sudlows was entitled to a further EOT, and indeed sought liquidated damages of £1.396 million in respect of Section 2. As Mr Molloy noted, the difference between the parties at the outset of the adjudication was nearly £20 million. On the other hand, the difference between the parties that turned on the question of the EOT of 133 days (or not) was about £1.2 million.

64. As already noted, Mr Molloy upheld Sudlows' loss and expense claim in respect of Window 29 in any event and, conversely, did not now award liquidated damages to Global in respect of that time period.

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.

69. As against that dispute, as characterised above, there is the dispute which was referred to Adjudication 5 and the decision thereon. That dispute concerned only a claimed EOT. I would accept that the decision to grant this EOT relied upon a finding that there were two Relevant Events, essentially consisting of the defective ductwork, and the absence of any unreasonable conduct on the part of Sudlows, but rather Global's unreasonable conduct in requiring Sudlows to terminate and energise the new cable, which caused the delay behind the EOT then being sought. I would accept that it would be an insufficient description of the decision to say that there was simply an EOT granted without more. I would also accept that it would be insufficient to say that the decision consisted only of the grant of the 234 days for Window 29 as one element in the total grant of 482 days which was the limit of the decision contended for by Mr Nissen KC. If the decision was limited in that way, then all it really consisted of was the ultimate result without reference to any "building block". On the other hand, Mr Curtis did not decide that the Relevant Events found were so for all times and all purposes going forwards, even if, on their face, they were or could be Relevant Events causing ongoing delay.

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.

72. I do not consider that any of the cases to which I have referred above would entail a different result.

73. For his part, Mr Nissen KC suggested that element (a) on its own would suffice and would always suffice. Certainly, it constitutes an obvious difference between the disputes here and is an important factor. Also, it is true that in some cases there were held to be different disputes even though the same time period was involved. However, it is not necessary for me to decide that point since, in my view, element (b) clearly also applies.

74. On the other hand, Mr Stewart KC said that to hold that the disputes were here not the same would entail serious disruptive consequences for adjudications. He posited the example of Sudlows' having lost its original EOT claim in Adjudication 5 because there were no Relevant Events. It could not surely then seek a further adjudication to re-run precisely the same point. He made a similar point at paragraph 61 of his Skeleton Argument. I can see that, if this was no more than a pure re-run. However, that is not this case nor, indeed, was it the case in *Quietfield* where the Court of Appeal held that the disputes were not the same even though the same time periods were involved and the claims involved the establishment of Relevant Events. At his paragraph 61, Mr Stewart KC also relied upon the following dicta of Akenhead J in *Carillion Construction Ltd v Smith* [2011] EWHC 2910 at paragraph 56 of his judgment:

> "(b) The fact that different or additional evidence, be it witness, expert or documentary, over and above what was relied upon in the earlier adjudication, is deployed in the later claim to be referred to a second or later adjudication, will not usually alter what the essential dispute is or has been. The reason is that evidence alone does not generally alter what is the essential dispute between the parties. One needs to differentiate between the essential dispute and the evidence required to support or undermine one party's or the other's case of defence".

75. I see that, but that does not necessarily follow where the dispute is about a different period of time and there are relevant new materials emanating from the further period. In addition, the later Court of Appeal decision in *Brown* shows that the analysis to be conducted is whether the later dispute is the same or substantially the same as the earlier one and one is entitled to look at the particular cases made by the parties.

76. At paragraph 62 of its Skeleton Argument, Sudlows makes the point that enforcement cannot be resisted on the basis that the adjudicator in question had made an error of fact. Quite so, but that is not the issue here.

77. Accordingly, speaking for myself, I am quite clear that the two disputes referred to adjudications 5 and 6 were not the same or substantially so. Accordingly, Mr Molloy was not bound by Mr Curtis's early decision in relation to the availability of an EOT for the earlier period.

78. However, I then need to turn to Mr Molloy's decision as to his jurisdiction where he found that he was bound by Adjudication 5 in the material respects. I accept that this would be the starting point for the analysis and respect must be accorded to his decision.

79. He stated at some length the case-law submitted to him at paragraphs 27-36 of his decision. He noted at paragraph 36 that in the earlier *Sudlows* case O'Farrell J was not concerned with the same issue as that before him (and me) namely the question of Relevant Events justifying an EOT.

80. At paragraph 39, Mr Molloy said that:

> "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."

81. At paragraph 41 he then said this:

> "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."

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 both 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.

83. Accordingly, notwithstanding the view taken by Mr Molloy here and according it weight, the position remains that it was wrong. He did in fact have jurisdiction, as he contemplated might be found when suggesting that he consider the merits, as it were, in his alternative findings.

84. Accordingly, there was a consequent breach of natural justice and the principal decision in Adjudication 6 cannot be enforced. That then leaves the question of whether Mr Molloy's alternative findings can be.

Severance

85. Sudlows contended in its Skeleton Argument that any enforcement of the alternative findings would require the decision to be severed but that was not possible here. Mr Stewart KC did not elaborate on this in his main oral submissions, although he referred to this issue briefly in reply. Sudlows' main point was that the alternative findings formed no part of the actual decision and indeed were not referred to in the formal part at the end of Mr Molloy's long decision. It was not therefore comparable to a case where a discrete or discernible part of the entire award remained enforceable, although not all of it.

86. I do not accept that this is a relevant difference for present purposes. I agree that the alternative finding was just that - a finding to be substituted for the primary one if the latter is not enforceable. But the alternative findings were ones which were just as detailed - in every respect - as the primary findings. Moreover, there was no point in Mr Molloy making them, nor in the parties agreeing that he should make them, if they were there not to be regarded as

binding (absent litigation or arbitration) if the primary findings fell away, as they have done in the relevant respects here.

87. A point was taken by Sudlows that it had reserved its position on Mr Molloy's jurisdiction in some relevant way. I accept that in agreeing that Mr Molloy should make alternative findings, Sudlows was not conceding its principal point which was that he was bound by Mr Curtis's decision in Adjudication 5 in the first place. That is obviously understood. But that does not mean that Sudlows was also contending that if Mr Molloy was wrong and in fact he was not bound, he had no jurisdiction to make the alternative findings. This seems to be the sense of the matters referred to by Mr Molloy at paragraph 25 of his decision, set out at paragraph 28 above.

88. In any event, both parties agreed he should make those alternative findings and they were covered by the parties in their extensive submissions. Indeed, one can see why Sudlows would permit him to do so, since it obviously thought that it would or might win on this alternative basis anyway. It just so happened that it did not. Again, Sudlows might disagree with Mr Molloy's assessment of the new material and its relevance, leading to his alternative findings (indeed it says that it is fundamentally flawed), but that is not something which it can challenge for present purposes.

89. Sudlows also made the point that even if (as I find) the alternative findings constitute a separate decision, the Court should be cautious because it would otherwise be affording that separate decision binding status (at least provisionally) whereas it was only *obiter*. I do not think that adjudication is or should be analysed in terms of precedent given that it is not ultimately binding. In any event, because of the way in which the alternative findings were made here, I can see no reason for the caution suggested.

90. In my judgment, and for the purposes of enforcement, Mr Molloy plainly had jurisdiction to formulate his award on an alternative basis, and that is so even though it is not referred to in the final Decision section. In my view, it did not need to be.

91. It would be most unfortunate if, having utilised the time spent in Adjudication 6, it was then to be of entirely no use for enforcement purposes. That would go against the spirit of having adjudication decisions that reflected the true dispute before the adjudicator. However, for the reasons given, that time has not been wasted.

CONCLUSION

92. Accordingly, for the reasons given above, the primary adjudication decision in favour of Sudlows cannot be enforced but the alternative findings leading to a sum payable to Global, will be. I am most grateful to Counsel for the helpful and succinct submissions. I will hear the parties on consequential matters following the handing-down of this judgment.