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# Construction and Engineering Matters

## UK – Autumn 2023

Welcome to the Autumn edition of *Construction & Engineering Matters* where we provide you with bite-sized updates on UK construction and engineering issues.

This Autumn edition includes:

- Is your invoicing regime safe from "smash and grab" claims?
- Making sure you are actually covered under coinsurance provisions
- Building Safety Act 2022 and recent changes
- Issues when facing potential contractor insolvency and getting projects back on track
- True value versus smash and grab adjudications – know your payment obligations
- What to watch out for on serial adjudications (how many bites of the cherry?)
- Looking ahead to Joint Contracts Tribunal (JCT) 2024

Please feel free to share with your contacts – we welcome feedback and suggestions for other topics which you would like to see covered in future editions.

# Is Your Invoicing Regime Safe From “Smash and Grab” Claims?

Sensibly, many construction contracts (including consultant appointments) look to tie the “final date for payment” to receipt of a VAT invoice; typically, “payment will be made within 30 days of receipt of a valid VAT invoice”.

However, in an obiter comment made by the judge in *Rochford Construction Ltd v. Kilhan Construction Ltd* and recently confirmed in the judgment in *Lidl Great Britain Ltd v. Closed Circuit Cooling Ltd*, this approach to invoicing is no longer reliable and creates risks for smash and grab adjudications.

You might have thought you were safe because you never received an invoice or it was for the wrong amount. Think again! You may now have a liability to pay sums on a default basis. Adjudicators are also alive to this issue.

## Is Doing Nothing an Option?

A provision looking to tie the final date for payment to receipt of a VAT invoice will now almost certainly fail in light of the *Lidl* judgment, which confirmed that this practice will result in the Scheme for Construction Constructs stepping in and making the “final date for payment” 17 days from the due date. This is regardless of whether you received an invoice. This may also impact on the date for any pay less notice as well. Put simply, the law can and will rewrite your contract timescales and risk profile in certain circumstances.

The first risk is that if you have not served a valid payment notice and your pay less notice is out of time (and it probably will be based on the amended timescales in your rewritten contract), you will have to pay the claimed amount regardless of whether you think it is due or where there is no invoice. This could apply equally to historic claims.

The second risk is practical. The linking of receipt of an invoice to the final date for payment never really dealt with a situation where a pay less notice was served – but at least it should have reflected the amount certified for payment. However, parties still require invoices for the correct amount and none of the standard forms (or many amended contracts) deal with this properly.

The *Rochford* and *Lidl* cases should, therefore, encourage you to review your payment provisions, which may not actually mean what you think!

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# Coinsurance on Construction Projects – The Importance of the Contract

## *FM Conway Ltd v. The Rugby Football Union & Ors* [2023] EWCA Civ 418

### Background

Preparations for the 2015 Rugby World Cup included major refurbishment works being carried out at Twickenham Stadium. As part of the refurbishment works, the Rugby Football Union (RFU) engaged Clark Smith Partnership (CSP) to design ductwork for the installation of high voltage power cables, and FM Conway Ltd (Conway) to install that ductwork.

The RFU had engaged Conway under a JCT Standard Building Contract Without Quantities 2011 (Contract) and, as it was obligated to do under the Contract, had taken out a joint names policy for all risks insurance under Insurance Option C (insurance in respect of works to/in existing structures (such as refurbishment works) and their contents and all risks insurance of the works) (Policy). The Policy expressly referred to Option C in respect of the ductwork and contained a waiver of subrogation clause under which the insurer waived all rights of subrogation against an insured party. In June 2012, prior to Conway's engagement under the Contract, the RFU and Conway had entered in a letter of intent (LOI) which was superseded by the Contract.

The cables were damaged, and the RFU was indemnified by the insurer (RSA) under the Policy for the costs of replacing the damaged cables. The RFU then brought a subrogated claim (on behalf of RSA) against CSP and Conway for the losses suffered, alleging that the loss resulted from negligent and/or defective design and installation of the ductwork, which caused the damage to the cables.

### The Coinsurance Defence

Conway argued that it was coinsured under the Policy (this was not in dispute) to the same extent as the RFU. Therefore, the RFU could not claim against it in respect of the alleged losses suffered, as the losses were covered by the Policy, nor could it bring a subrogated claim on behalf of RSA.

Conway attempted to rely on pre-contractual discussions to show that the parties had agreed that the RFU would procure more extensive insurance cover than that required under JCT Option C.

### The First Instance Decision in the Technology and Construction Court (TCC)

The key preliminary issue that Eyre J was required to determine was "whether the insured losses… are irrecoverable because RSA cannot exercise subrogation rights and/or because on a proper interpretation of the project policy and/or the project policy and the JCT contract the RFU and/or the RSA are not entitled to claim the insured losses".

Eyre J summarised the relevant authorities on coinsurance and held that the authorities are clear that in determining whether the insurance policy effected by the RFU (as Employer) applies to Conway and if so, the extent to which Conway is coinsured. "It is necessary to look at the terms of the contract between those parties. It is those terms that provide the key to the existence and extent of the insurance cover (and that Lord Toulson identified in *Gard Marine & Energy Ltd v. China National Chartering Co Ltd* [2017] UKSC 35)… "the critical question" as being the effect of the "contractual scheme" between the parties with this being a "matter of construction".

Eyre J carried out an analysis of the pre-contractual dealings/negotiations that took place prior to the LOI being entered into and the contractual scheme (that being the LOI, the policy and the contract), to determine the RFU's intention at the time the policy was entered into, and the extent of the RFU's authority from Conway with respect to the insurance cover to be obtained and the extent of that cover. As illustrated in the relevant authorities, Eyre J reiterated that it is the terms of the contract between the RFU and Conway that are "key to ascertaining the effect of the insurance which was obtained pursuant to the Contract".

After carrying out the above analysis, Eyre J held that:

- The LOI expressly stated that the contract the RFU and Conway were intended to enter into would be in the terms of the JCT Standard Building Contract Without Quantities 2011, and the parties then entered into the contract on those terms. The LOI also made clear that the contract (when entered into) would supersede the LOI and have retrospective effect.
- The RFU's authority and intention to procure insurance cover was governed by the terms of the contract. The parties had agreed to Insurance Option C and, therefore, the RFU had the authority and intention to procure insurance in accordance with Option C and was required to take out insurance cover on that basis, but nothing more.
- Option C required the RFU to effect insurance that provided cover to Conway in respect of physical loss or damage to the work executed or to site materials. However, the cost of rectifying damage caused by Conway's own defective work would be excluded from any such policy.
- The insurance policy effected by the RFU was a composite, project-wide policy under which each insured is insured (in effect under a separate policy) with respect to its own rights and interests. Therefore, the RFU and Conway could be coinsured under the same insurance policy but with the scope and extent of cover differing as between the RFU and Conway.
- The RFU and Conway were coinsureds under the insurance policy effected by the RFU, and the policy covered the loss that eventuated; however, Conway's cover was not coextensive with the RFU's with respect to that loss and, therefore, Conway was not coinsured with respect to that loss.
- As Conway was not coinsured for the losses for which the RFU was indemnified under the policy, Conway could not rely on the coinsurance defence or the waiver of subrogation in the insurance policy, which only extended to matters for which Conway was insured against.
- Given there is no reference to such an arrangement in the LOI or the contract, there cannot have been any agreement or an intention to create a fund, recourse to which would be the RFU's sole remedy for loss suffered as a result of Conway's breach. The contract and the contractual scheme prevailed over any pre-contractual discussions between the parties as to the insurance policy required to be effected by the RFU.

## Court of Appeal Decision

The Court of Appeal unanimously upheld Eyre J's first instance decision and dismissed all five of Conway's grounds of appeal.

Lord Justice Coulson, who gave the lead judgment, confirmed that Eyre J had correctly analysed the complex issues in dispute and held that, while it was common ground that Conway was coinsured under the policy of insurance and that the policy covered the loss that eventuated (because the RSA had paid out to the RFU), the extent of Conway's cover differed from the RFU's and did not extend to the loss that eventuated.

In Paragraph 53 of his judgment, Lord Justice Coulson summarised the five key principles with respect to matters of coinsurance as set out by the Supreme Court in the *Gard Marine* case and held that:

1. "The mere fact that A and B are insured under the same policy does not, by itself, mean that A and B are covered for the same loss or cannot make claims against one another…"
2. "In circumstances where it is alleged that A has procured insurance for B, it will usually be necessary to consider issues such as authority, intention (and the related issue of scope of cover)…"
3. "An underlying contract between A and B is not a necessary prerequisite for a proper investigation into authority, intention, and scope… However, a contract may well be implied in any event…"
4. "On the other hand, where there is an underlying contract then, in most cases, it will be much the best place to find evidence of authority, intention and scope…"
5. "That is not to say that the underlying contract will always provide the complete answer. Circumstance may dictate that the court looks in other places for evidence of authority, intention, and scope of cover…"

The Court of Appeal held that Eyre J had properly considered and applied the above principles and had correctly decided that the RFU had authority and intention to effect the insurance cover required by JCT Option C but did not have authority or an intention to effect wider cover.

The Court of Appeal reaffirmed Eyre J's conclusions that the underlying contract and the contractual scheme is key when considering the scope and extent of coinsureds' cover under a joint names insurance policy, and the contract prevailed over any pre-contractual negotiations. Lord Justice Coulson confirmed that it was clear from the LOI, the contract and the insurance policy that Conway's cover did not extent to the loss that eventuated (for which the RFU was indemnified), that being the cost of rectifying damage caused by Conway's own defective works.

## Commentary

This is an important decision for parties considering matters of coinsurance on construction projects. The Court of Appeal's decision provides clarification on the circumstances in which a party may rely on the coinsurance defence and the operation of a joint names insurance policy with respect to works and existing structures. The judgment reaffirms the position established by earlier authorities on coinsurance and makes clear that the scope and extent of a coinsured's cover is not determined solely by the insurance policy wording, but rather, while the policy wording is an important factor, it is the terms of the underlying contract and the contractual scheme that are determinative.

This is the position, even where, as in this case, on the face of the insurance policy alone, Conway's cover appeared to extend to the damage caused to the cables/ductwork, because Conway's cover under the policy was only to the extent required under the contract.

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# The Building Safety Act 2022

The Building Safety Act 2022 is high on the agenda of many organisations across the industry, and a further raft of new regulations came into force on 1 October 2023, providing further details on the new building safety regime. As many will already know, the building safety regime impacts buildings throughout their life cycle (split into the construction phase and occupation phase) with a focus on "higher-risk buildings" (high-rise residential buildings).

Together with our environmental, safety and health (ESH) colleagues, we have significant expertise in construction, fire and building safety, and real estate matters, and have been working closely with clients in this space. We have acted for owners, operators and managers of property portfolios containing higher-risk buildings, including those with live fire and building safety issues, such as combustible cladding, lack of compartmentation, a lack of clarity as to who owes what duties (if any), and a general lack of on the ground compliance.

Together with our ESH colleagues, we can assist with:

- Legal reviews of property portfolios to identify duty holders (principal accountable person, accountable persons, responsible persons)
- Advising on fire and building safety duties, as well as enforcement and sanctions for noncompliance
- Providing commercial and practical advice on managing compliance and risk, including company and directors' liabilities, compliance arrangements and management, and technical legal reviews of fire risk assessments and appraisals (internal and external)
- Concisely and clearly communicating the technical legal position to stakeholders and negotiating and/or seeking assurances on the delivery of legal and practical compliance
- Defending regulatory investigations and prosecutions
- Managing and resolving civil disputes relating to fire and building safety issues – have a look at our article on fire-related defects claims from May 2023.

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# Contractor Failure and Necessary Developer Safeguards

Recent global conditions are having an ever-increasing impact on the financial stability of construction firms in the UK. Construction firms are currently struggling with items such as rising interest rates, inflation, material and/or labour costs, all of which are placing significant pressures on contractor profits. Consequently, developers need to be conscious of the ever- increasing risks posed by contractor insolvency during projects.

Contractor (and/or material subcontractor) failure during the construction period may have far-reaching consequences for the developer (or the principal contractor), potentially causing delays and/or leading to damage to incomplete works.

Can developers protect themselves against such insolvency risk? Here we consider key issues from the developer's perspective and what (if any) measures developers can take to help mitigate against contractor failure and the consequent risks.

## Contractor's Failure

Where the principal contractor on a project becomes insolvent, the developer takes on an added layer of complexity in respect of completion of the project, such as:

- Selection of a new contractor (including additional costs associated with same)
- Design responsibility (in circumstances where the insolvent contractor undertook single point responsibility for design of the project works)
- Project delays
- Maintenance of relationships with the existing supply chain
- Reliance on performance bonds and/or parent company guarantees (if any)
- Project insurance considerations (including contractor's all risk, public liability insurance and insurance for design risk)
- Site security issues, where the site is not live

## Developer Considerations in Project Documents

- With prudent foresight, developers can provide suitable safeguards in their contract documents to help mitigate their risk and exposure to the above items. Developers may consider (when finalising contract documents) the following:
- **Collateral warranties** – The provision of collateral warranties (including step-in rights) from key members of the contractor's supply chain (i.e. subcontractors with material design responsibility and/or subcontractors providing key subcontract packages).
- **Security** – Provision of security instruments, such as:
  - **Parent company guarantee** – Which generally underwrites the contractor's liability for the relevant contractor limitation period (under the building contract). Consider amending the building contract to allow a call on the PCG at the time of the insolvency event.
  - **Performance bond** – Whereby an agreed surety provides the developer with the benefit of a performance bond (which is generally up to 10% of the contract sum), and which can be called upon in circumstances where the contractor has breached its obligations under the building contract (including events of insolvency, where insolvency is expressly provided as an event of default and/or amending the building contract to allow a call under the bond at the time of the insolvency event).
- **Insurance** – The developer may consider use of:
  - **Latent defects insurance**
  - **Owner controlled insurance programme insurance (OCIP)** – Which is an insurance policy taken out by the developer having project works undertaken on its behalf. As the policyholder, the developer is fully insured instead of relying on multiple contractors' insurance policies with undisclosed exclusions.
- **Insolvency** – Developers should consider how they define insolvency in the proposed building contract for the project and specifically how wide or narrow this definition should be: for example, should the definition include where the contractor has filed a notice of intention to appoint an administrator, thereby covering (one among several) pre-insolvency triggers and effectively bringing the contract to an end, sooner rather than later?

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# True Value and Smash and Grab Adjudications – Know Your Payment Obligations

There has been much debate ever since the landmark decision in *S&T (UK) Ltd v. Grove Developments Ltd [2018] EWCA Civ 2448*, where the Court of Appeal confirmed that section 111 of the Housing Grants, Construction and Regeneration Act 1996 (Construction Act) creates an immediate obligation to pay the notified sum, and further, that the right to adjudicate (under section 108) is subjugated to the immediate obligation to pay. *S&T* was followed by *Bexheat Ltd v. Essex Services Group Ltd* [2022] EWHC 936 (TCC), where Mrs. Justice O'Farrell held, after reviewing relevant case law, that it was clear that "unless and until an employer has complied with its immediate payment obligation under section 111, it is not entitled to commence, or rely on, a "true value" adjudication under section 108 [of the Construction Act]". But why is the "immediate payment obligation" important when it comes to adjudications?

The TCC in *Henry Construction Projects Ltd v. Alu-Fix (UK) Ltd [2023] EWHC 2010* has provided some useful clarity. In brief, the Liverpool District Registry of the TCC held that a party could not start a true value adjudication while a smash and grab (or technical knock-out) adjudication was in progress. Accordingly, the second (true value) adjudicator lacked jurisdiction and his decision was not enforced.

The first smash and grab adjudication dealt with the defendant's – Alu-Fix's (subcontractor) – termination account. The subcontractor's position was that it should have been paid but was not, and the contractor (Henry Construction) argued that it had submitted two potentially valid pay less notices. Before the first adjudicator's decision was issued, the claimant contractor referred the dispute to a second adjudicator (aka the true value adjudication) arguing that it had overpaid the subcontractor, which was accordingly indebted to the contractor. There was then a jurisdictional challenge resulting in the true value adjudication being stayed pending the outcome of the first (smash and grab) adjudication.

The first adjudicator awarded money to the subcontractor, which the contractor paid. This allowed the second (true value) adjudication to continue, with the second adjudicator concluding that the subcontractor in fact owed money to the contractor; however, the subcontractor refused to pay.

It is important at this stage to review the meaning of the notified sum that was dealt with in the *Bexheat* case. Where an employer (or contractor (payer)) fails to issue a valid payment notice or pay less notice, it must pay the notified sum in accordance with section 111 of the Construction Act by the final date for payment, failing which the contractor (or subcontractor (payee)) is entitled to seek payment of such sum by obtaining an adjudication award in its favour. However, where a party fails to pay the notified sum, it can only commence a true value adjudication in respect of the sum in issue once it has complied with its immediate payment obligation under section 111. The judge in *Bexheat* referred to Jackson LJ's judgment in S&T, where he said (*obiter*, i.e. in passing, so not strictly part of the judgment) that "The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a revaluation of the work before he has complied with his immediate payment obligation." But what about a practical setting off of one decision against another?

This question was answered in the subsequent case of *M Davenport Builders Ltd v. Greer* [2019]:

"In answer to the question whether a person who has not discharged his immediate obligation *should* be entitled to rely upon a later true value decision by way of set-off or counterclaim in order to resist the enforcement of his immediate obligation, I would give a policy-based answer that, in my view, he should not be entitled to do so since that would enable a defendant who has failed to implement the payment or pay less notice provisions to string the claimant along while he goes about getting the true value adjudication decision rather than discharging his immediate obligation and then returning if and when he has obtained his true value decision."

## Henry Construction – The Enforcement Proceedings in Court

In seeking to enforce the true value adjudication, the claimant contractor unsuccessfully argued:

1. That the final date for payment should not be the final date for payment under the subcontract (13 December 2022) but should be extended to the deadline for compliance with the first adjudicator's decision (3 February 2023 – the decision was issued on 27 January 2023). The judge disagreed, as he considered that the best description that could be applied to that date would be the "final date for late payment".
2. That where there was a genuine dispute regarding payment in the smash and grab adjudication, a true value adjudication should be allowed. The judge rejected this submission by reaffirming the key rationale behind the Construction Act, which is that cash flow should not be undermined and that there should be no delays to payment.

In summary, the judge considered whether the claimant could commence or rely on a true value adjudication started (on 18 January 2023) before it had paid the notified sum (paid on 2 February 2023). His conclusion was that it could not. The final date for payment was before the first adjudication was started (13 December 2022 vs. 18 January 2023). The judge referred back to *Bexheat*, according to which section 111(1) of the Construction Act provides that the notified sum must be paid by the final date for payment, and this creates the immediate payment obligation. In summary, the contractor "was prohibited from embarking upon/not entitled to commence the TVA (true value adjudication) on 18th January 2023 without first having discharged its immediate payment obligation and [the second TVA adjudicator] lacked jurisdiction as a result."

Interestingly, in relation to the "genuine dispute" issue or "tension" relating to (2) above, the judge said, "Overall, in my view, the outcome of this case, whilst not closing the door on commencing a TVA prior to the outcome of a SGA and later relying upon the outcome, ought to discourage such a course in areas of spurious SGA (smash and grab adjudication) 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." However, on the facts of this case, the contractor's summary judgment application to enforce the true value adjudication was unsuccessful. So there is some flexibility and more thinking to be done when it comes to immediate payment obligations.

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# How Many Bites of the Cherry?

*Sudlows Ltd v. Global Switch Estates 1 Ltd [2023] EWCA 813* is an important Court of Appeal judgment that goes to the heart of the question, what can you adjudicate where there has been a previous or series of adjudications, i.e. to what extent has the "dispute" been decided? Sudlows (the contractor) appealed against a judge's decision overturning an adjudicator's conclusion that he was bound by an earlier adjudication finding that Global (the employer) was contractually liable to Sudlows.

Global employed Sudlows to carry out the fit-out of its data hall (the contract was based on the JCT Design and Build contract form). The work included the laying of new HV cables from a separate part of Global's premises on the other side of a main road. There was an agreed division of contractual responsibility, with Global being responsible for the ductwork and Sudlows being responsible for the installation of the cables through the ductwork.

## Adjudications 5 and 6

The ductwork was some 15 months late. Sudlows then installed the HV-B cables, and one of the cables was damaged. Sudlows argued that the ductwork was defective, while Global argued the cable and/or cable installation was inadequate. There then followed a stand off with Sudlows refusing to carry out any more work regarding the cables unless that work was paid for.

Subsequently, Global engaged a different contractor to pull another set of cables through the ductwork. After a series of claims and counterclaims, no resolution was reached. This gave rise to numerous adjudications.

## Adjudication 5 Decision

In adjudication 5, Sudlows claimed for an extension of time of 509 days, based on the defective ductwork undertaken by Global. The parties agreed that the delay was caused by the cabling and ductwork issues and that this was the only relevant event causing the delay – however, who was contractually responsible?

Adjudicator 5 decided that the ductwork was defective and not fit for purpose. Therefore, Global was culpable for the resulting delays. The adjudicator decided that Sudlows was entitled to a total extension of time of 482 days to 8 December 2020.

## Adjudication 6

Following its loss in adjudication 5, Global could no longer wait and hope that the deadlock might somehow be broken in another way. Therefore, in order to progress matters, it had no other option but to omit the testing and energisation of the new cables from Sudlows' scope of work. The omission allowed the contract administrator to certify practical completion.

Subsequently, Sudlows requested a further extension of time to the practical completion being based on a continuation of the delay assessed in adjudication 5, i.e. a "logical extension" of the first successful claim where the same relevant event was the sole cause of both periods of delay. Sudlows argued that the "natural consequences" of the first adjudicator's decision in adjudication 5 was the award of the further 133 days' extension of time.

Following Global's refusal to grant a further extension of time, Sudlows commenced adjudication 6, which encompassed both the claim for continued delay assessed in adjudication 5 and a claim for loss and expense covering periods claimed in both adjudications 5 and 6.

In the referral notice in adjudication 6, Sudlows relied on the findings in adjudication 5 as binding on adjudicator 6 and it therefore followed, Sudlows argued, that the further extension of time in adjudication 6 should be granted. Global, in response, maintained its position from adjudication 5 but also submitted two further reports as new evidence that the ductwork was not defective.

## Adjudication 6 Decision

Adjudicator 6 agreed with Sudlows that he was bound by adjudication 5 and consequently decided Sudlows was entitled to the further extension of time plus just under £1 million in loss and expense. However, adjudicator 6 specified that if he was wrong (i.e. he was not, in fact, bound by adjudication 5), then he would have concluded that the more probable cause of the cable installation failure was the cable itself or its installation rather than the ductwork. This alternative finding would have resulted in approximately £200,000 going to Global as opposed to Global paying Sudlows just under £1 million.

## Challenge to Enforcement

Global refused to pay Sudlows and Sudlows commenced enforcement proceedings. Global argued that (1) the adjudicator was wrong in considering that he was bound by adjudication 5 and (2) the disputes were not the same or substantially the same – largely based on the claimed time periods being different in adjudications 5 and 6 and the new evidence provided in adjudication 6.

## First Instance Court Decision

At first instance, Judge Waksman agreed with Global that the disputes in the two adjudications were different and, therefore, adjudicator 6 was not bound by the previous adjudicator. He referred to this as the "prior decision" issue. In other words, the sixth adjudicator had taken too narrow a view of his jurisdiction and his decision was unenforceable. The judge went on to find that Global was entitled to enforcement of adjudicator 6's alternative decision in Global's favour. Sudlows appealed.

## The Appeal

The question for the Court of Appeal was whether adjudicator 6 was bound by the decision of adjudicator 5. The Appeal Court said he was and that his primary decision (that he was bound) was correct and would be enforced.

An adjudicator cannot determine a dispute that has already been decided. The test is whether the dispute is the same, or substantially the same, as the earlier dispute. That is a matter of fact and degree. It is a complicated issue, particularly in serial adjudications when parties are arguing over delay.

The starting point is section 108(3) of the Housing Grants, Construction and Regeneration Act 1996, which provides that "The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, or by arbitration … or by agreement."

Further, paragraph 9(2) of the Scheme for Construction Contracts (Scheme) 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." In addition, paragraph 23(2) of the Scheme provides that "The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

Coulson LJ concluded the sixth adjudicator's analysis on being bound was right and the first instance judge was wrong. The judgment provides a useful summary of the authorities on the question of the binding nature of a previous adjudicator's decision. Coulson LJ stated that the relevant principles were "crystal clear", and set out three over arching principles an adjudicator or enforcing court should apply, as follows (in brief):

- "The purpose of construction adjudication is not easy always to reconcile with serial adjudication … the adjudicator (and, if necessary, the court on enforcement) should be encouraged to give a robust and common sense answer to the issue. It should not be a complex question of interpretation of documents and citation of authority."
- "The need to look at what the first adjudicator actually decided to see if the second adjudicator has impinged on the earlier decision … what matters … is what it was, in reality, that the adjudicator decided. It is that which cannot be re-adjudicated."
- "The need for flexibility. That is the purpose of a test of fact and degree. It is to prevent a party from re-adjudicating a claim (or a defence) on which they have unequivocally lost … but to ensure that what is essentially a new claim or a new defence is not shut out."

It goes without saying that the first question in serial adjudications will be, "What did the (previous) adjudicator decide." Rather than simply looking at the dispute referred to in the first adjudication in insolation, the answer will start with a review of the actual decision of the previous adjudicator. Having analysed what the previous adjudicator actually decided, this will dictate how much remains open for consideration by a subsequent adjudicator. Identifying the level of overlap between decisions and the extent to which the previous dispute is substantially the same as the subsequent dispute will be a question of fact and degree. Reference was made to previous relevant case law where judges were of the view that "although a finding can be binding, this is restricted to a finding that forms an, "essential component of" or "basis for" the decision."

Undoubtedly, each case will depend on its own facts and analysis. What is clear, however, is that courts will be reluctant to interfere with adjudicators' decisions, and they will take a commonsense approach to what can be complicated and complex questions, particularly in relation to delay issues – always remembering that adjudication is a "rough and ready" form of temporary justice. This was an unusual case, as different time periods were claimed in the two adjudications, but there were no competing relevant events, as it was agreed that the cabling and ductwork issues were the only cause of the relevant delay, and the period of delay was also agreed. Also noteworthy is the appeal court judge's comment that "If Global wanted to challenge his decision, as they clearly did, then they had every right to do so: but the challenge had to go to court or arbitration, not by way of another adjudication."

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# JCT 2024 – What to Expect?

After nearly 8 years, the JCT is expected to issue its latest suite of construction contracts in the early part of next year, with a focus on modernisation and streamlining. What is new you may ask? There are a variety of changes, including:

- Topical provisions relating to the Building Safety Act 2022 and two new insolvency grounds introduced in the Corporate Insolvency and Governance Act 2020
- The addition of new contracts – the JCT Target Cost Contracts
- Adoption of gender-neutral language
- Provision for electronic execution and notices
- Changes to the extension of time provisions such as new "relevant events" covering epidemics, for example
- Widening of the grounds for the contractor to claim loss and expense, including the extension of the "relevant matter" dealing with antiquities to deal with unexploded bombs (UXBs), contamination and asbestos
- Amending the liquidated damages (LD) clauses to confirm that LDs apply up to termination of a contract, and a claim for general damages applies thereafter
- Future proofing, including changes to reflect the objectives of the Construction Playbook, and collaborative working, sustainable development and environmental considerations

Watch this space for latest news on the JCT 2024, likely timings and more details...

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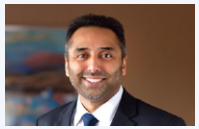

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