Neutral Citation Number: [2017] EWHC 1405 (TCC)

Case No: HT-2017-000089

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 21 June 2017

Before:

THE HON MR JUSTICE COULSON

- -

Between:

Mailbox (Birmingham) Limited	**Claimant**
- and -	
Galliford Try Building Limited (formerly known as Galliford Try Construction Limited)	**Defendant**

- -
- -

Mr David Thomas QC (instructed by **Eversheds Sutherland**) for the **Claimant**
Mr Piers Stansfield QC (instructed by **Dentons UKMEA LLP**) for the **Defendant**

Hearing date: 22 May 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE COULSON

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. On 13 April 2017, the claimant ("Mailbox") commenced these Part 8 proceedings against the defendant ("GTB"). They seek wide-ranging declarations to the effect that, following the adjudicator's decision of 6 November 2016, Mailbox's entitlement to liquidated damages has been finally decided (subject only to any subsequent challenge in court) and that, as a result, no subsequent adjudicator can have the jurisdiction to consider any further extension of time claims made by GTB. On the very same day, GTB commenced a second adjudication in which, amongst other things, they seek an extension of time in relation to a part of the works known as section 3.

2. I have not found this dispute easy to resolve. On one analysis, it might be said to involve the collision between two opposing principles. On the one hand, it is trite law that, once a crystallised dispute has arisen, a defending party in adjudication cannot seek to limit the defence previously advanced, much less to save parts of that defence for another day (see, in particular, ***Cantillon v Urvasco Limited*** [2008] EWHC 282 (TCC) and ***Working Environments Limited v Greencoat Construction Limited*** [2012] EWHC 1039 (TCC)). On the other hand, in a second adjudication, a contractor is entitled to defend himself against a claim for liquidated damages by relying on a full extension of time claim, even though he has already made a limited extension claim in an earlier adjudication (***Quietfield Limited v Vascroft Construction Limited*** [2007] BLR 67). The resolution of that apparent conflict is at the heart of the debate between the parties.

3. I deal with the disputes between the parties in the following way. In **Section 2** of this Judgment, there is a summary of the relevant parts of the contract. In **Section 3**, there is a detailed chronology. In **Section 4** I summarise the applicable principles of law. In **Section 5** I then analyse the parties' submissions by reference to: (i) Mailbox's claim for liquidated damages; (ii) GTB's claim for extensions of time; and (iii) GTB's claim that Mailbox wrongly terminated and/or repudiated the contract.

2. THE CONTRACT

4. Pursuant to a contract dated 23 December 2013, Mailbox employed GTB to construct a major development on the edge of the city centre in Birmingham. The works were divided into numerous sections. The terms of the contract dealing with delay and extensions of time were at clauses 2.24 - 2.29 of the JCT standard form (as amended by the parties). Terms of particular relevance to the present dispute are as follows:

> "**Notice by Contractor of delay to progress**
>
> 2.24
>
> .1 If and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give notice to the Employer of the material circumstances, including the

cause or causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Event.

.2 In respect of each event identified in the notice the Contractor shall, if practicable in such notice or otherwise in writing within 21 days thereafter.

.1 provide such further documents and information as the Employer may reasonably require in order to demonstrate the Contractor's entitlement to further time; and

.2 provide updates of such documents and information from time to time and as requested by the Employer.

.3 The Contractor shall forthwith notify the Employer of any material change in the estimated delay or in any other particulars and supply such further information and programmes as the Employer may at any time reasonably require.

.4 The Contractor shall not be entitled to any extension of time to the extent that any such claim is due to the Contractor having failed to comply with clauses 2.24.1, 2.24.2 and/or 2.24.3.

Fixing Completion Date

2.25

.1 If on receiving a notice, programmes / and particulars under clause 2.24:

.1 any of the events which are stated to be a cause of delay is a Relevant Event taking into account, without limitation, clauses 2.24.4 and 25.6.5; and

.2 completion of the Works or of any Section is likely to be delayed thereby beyond the relevant Completion Date,

then, save where these Conditions expressly provide otherwise, the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be fair and reasonable.

2.26 The following are the Relevant Events referred to in clauses 2.24 and 2.25:

.1 Changes and any other matters or instructions which under these Conditions are to be treated as, or as requiring, a Change;

.2 Employer's instructions:

.1 under clause 2.13, except for any instructions relating to a discrepancy or divergence in or between the Contractor's Proposals and/or any drawings or documents issued under clause 2.8;

.2 under clause 3.l0 or 3.11 (except to the extent that the Contractor has planned, programmed and priced work for any defined Provisional Sum); or

.3 for the opening up for inspection or testing of any work, materials or goods under clause 3.12 or 3.13.3 (including making good), unless the inspection or test shows that the work, materials or goods are not in accordance with this Contract or (in the case of instructions relating to clause 3.13.3 and whatever the results of the opening up for inspection or tests) unless the instructions were reasonable in all circumstances having due regard to the Code of Practice referred to in clause 3.13.3;

.3 deferment of the giving of possession of the site or any Section under clause 2.4 provided that the period of extension given shall in no circumstances be greater than the period of deferment;

.4 compliance with clause 3.15.1 or with Employer's instructions under clause 3.15.2;

.5 suspension by the Contractor under clause 4.l1 of the performance of any or all of his obligations under this Contract;

.6 any impediment, prevention or default, whether by act or omission, by the Employer or any of the Employer's Persons, except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or of any of the Contractor's Persons;

.7 the carrying out by a Statutory Undertaker of work in pursuance of its statutory obligations in relation to the Works, or the failure to carry out such work subject to the Contractor having placed the necessary orders and given all necessary instructions in good time;

.8 exceptionally adverse weather conditions, provided that the Contractor shall provide Meteorological Office statistics for the locality of the site for the last 10 years to support the contention that weather conditions were exceptionally adverse;

.9 loss or damage occasioned by any of the Specified Perils;

.10 civil commotion or the use or threat of terrorism and for the activities of the relevant authorities in dealing with such event or threat;

.11 strike, lock-out or local combination of workmen affecting any of the trades employed upon the Works or any of the trades engaged in the preparation, manufacture or transportation of any of the goods or materials required for the Works or any persons engaged in the preparation of the design for the Works unless the same is limited to the site or to the Contractor at its various sites of operation or in any way caused by the Contractor;

.12 the exercise after the Base Date by the United Kingdom Government of any statutory power which directly affects the execution of the Works and not reasonably foreseeable at the Base Date;

.13 delay in receipt of any necessary permission or approval of any statutory body which the Contractor has taken all practicable steps to avoid or reduce;

.14 force majeure.

Practical Completion, Lateness and Liquidated Damages

Practical completion

2.27.1

.1 When the Works or any Section has been completed in accordance with the Contract and practical completion of the Works or a Section is achieved and the Contractor has complied sufficiently with clauses 2.37 and 3.16.5, then:

.2 In the case of the Works, the Employer shall forthwith issue a statement to that effect ('the Practical Completion Statement');

.3 in the case of a Section, he shall forthwith issue a statement of practical completion of that Section (a 'Section Completion Statement');

and practical completion of the Works or the Section shall be deemed for all the purposes of this Contract to have taken place on the date stated in that statement.

Non-Completion Notice

2.28 If the Contractor fails to complete the Works or a Section by the relevant Completion Date, the Employer shall issue a notice to that effect (a 'Non-Completion Notice'). If a new Completion Date is fixed after the issue of such a notice, such fixing shall cancel that notice and the Employer shall where necessary issue a further notice.

Payment or allowance of liquidated damages

2.29

.1 Provided:

.1 the Employer has issued a Non-Completion Notice for the Works or a Section; and

.2 the Employer has notified the Contractor before the due date for the final payment under clause 4.12.5 that he may require payment of, or may withhold or deduct, liquidated damages,

the Employer may, not later than 5 days before the final date for payment of the amount payable under clause 4.12, give notice to the Contractor in the terms set out in clause 2.29.2.

.2 A notice from the Employer under clause 2.29.1 shall state that for the period between the Completion Date and the date of practical completion of the Works or that Section:

.1 he requires the Contractor to pay liquidated damages at the rate stated in the Contract Particulars, or lesser rate stated in the notice, in which event the Employer may recover the same as a debt; and/or

.2 that he will withhold or deduct liquidated damages at the rate stated in the Contract Particulars, or at such lesser stated rate, from sums due to the Contractor.

.3 The Contractor shall pay the Employer the liquidated damages sum due under clause 2.29.1.2 within 21 days of the Employer's demand for the same.

> .3 If the Employer fixes a later Completion Date for the Works or a Section, the Employer shall pay or repay to the Contractor (but without interest) any amounts recovered, allowed or paid under clause 2.29 for the period up to that later Completion Date.
>
> .4 If the Employer in relation to the Works or a Section has notified the Contractor in accordance with clause 2.29.1.2 that he may require payment of, or may withhold or deduct, liquidated damages, then, unless the Employer states otherwise in writing, clause 2.29.1.2 shall remain satisfied in relation to the Works or Section, notwithstanding the cancellation of the relevant Non-Completion Notice and issue of any further Non Completion Notice."

5. I was also referred to clause 8.4, which dealt with termination as a result of the default of the contractor. One of the grounds that permits an employer (in this case Mailbox) to terminate the contractor's employment is if the contractor (in this case GTB) "fails to proceed regularly and diligently with the performance of his obligations under this Contract…"

6. Clause 8.7 deals with the financial consequences of termination. Pursuant to clause 8.7.4, an account has to be made which allows for "the total amount which would have been payable for the Works in accordance with this Contract". It is common ground that that would include both liquidated damages by Mailbox and any claim by GTB for loss and expense due to delay.

3. THE CHRONOLOGY

3.1 Background to the Notice of Adjudication

7. On 12 May 2015, GTB provided a lengthy application for an interim extension of time on section 1. The claim was for an extension of time of 25 weeks and 3 days. At this point, the section 1 works had not been completed.

8. On 27 July 2015, GTB provided a series of further claims for extensions of time. Two claims related to section 1: the first was a claim for an extension of time of 311 days; the second was a claim (in the alternative) for 253 days. There were also claims for delay and disruption in relation to sections 1B, 1C, 2, 2A, 2B, 2C, 3 and 4. Each of these was in bullet point form, identifying the relevant events said to have caused delay, but not the particular delays said to have been caused thereby.

9. On 5 August 2015, GTB provided a detailed claim for an interim extension of time in relation to section 2C. What was sought was an extension of 21 weeks and 5 days. In response, on 28 October 2015, DBK, Mailbox's agents, reiterated a request for particulars of the claim in respect of section 2C, saying that such information was a precondition to GTB's entitlement to an extension of time.

10. On 9 September 2015, GTB wrote a lengthy letter about delays and extensions of time and identified certain instructions which they said were outstanding. GTB said that in

consequence they were prevented from completing the works. Although there was a reference "particularly" to section 1, the whole tenor of the letter is about delays and damages for delay generally. GTB went on: "In these circumstances, and in conjunction with only the limited extension of time that has been so far awarded, we consider it is wholly inappropriate to deduct liquidated damages."

11. On 6 November 2015, DBK served on GTB the first of a number of notices pursuant to clause 2.29.1 seeking liquidated damages for a stated period in respect of section 1. Similar notices were served on 16 December 2015, and 15 January 2016, in respect of sections 2, 2A, 2B, 2C, 3 and 4.

12. During the same period, on 14 December 2015, GTB asserted that they were entitled to the fixing of later completion dates on these sections; in other words, that they were entitled to extensions of time on all sections that were late. On 15 January 2016, GTB wrote another lengthy letter about delays and extensions of time and referred to their previous letters and claims which they said had not been answered. They repeated that they had incurred loss and expense in consequence of the delays. The letter complained generally about the inadequate extensions of time which had thus far been granted in respect of sections 1, 2, 2A, 2B, 2C, 3 and 4 (first paragraph) and particularly about GTB's entitlement to an extension on sections 1, 2C, 3 and 4 (the bullet points).

13. On 28 January 2016, GTB wrote again (after the updated clause 2.29.1 notices of 15 January 2016). They asserted errors in the calculation of liquidated damages and complained about the absence of responses to their earlier claim letters. The letter expressly referred back to GTB's letter of 15 January 2016 (paragraph 12 above). Again, this letter was written with express reference to each of sections 1, 2, 2A, 2B, 2C, 3 and 4.

14. By 1 March 2016, all the sections had been completed, with the exception of section 3. On that day, DBK served a termination notice pursuant to clause 8.4.2 of the contract, based upon what they said was GTB's suspension of the works and/or their failure to proceed regularly and diligently with the performance of their obligations and/or their failure to comply with notices and instructions. In consequence of these failures, DBK notified GTB "that the Contractor's employment under the Contract is terminated with immediate effect."

15. On 18 March 2016, DBK gave notice to GTB, by way of a payless notice pursuant to clause 4.10.2 of the contract, of Mailbox's entitlement to the gross sum of £5,180,410.59 by way of liquidated damages. Deducting the sums that had already been deducted from GTB's account of £1,785,400.59, which left a total due from GTB to Mailbox of £3,395,010.

16. Over the next five months there were discussions and correspondence between the parties on all these issues, but there was no resolution of the dispute between them as to delay and liquidated damages.

3.2 The Notice of Adjudication

17. On 19 August 2016, Mailbox served their notice of adjudication. This identified the dispute that had arisen between the parties as being "as to Mailbox's entitlement to

liquidated damages ("LADs") under the Contract." The notice went on to note that sections 1A, 1B and 1C were completed ahead of their contractual date for completion, and were therefore irrelevant for these purposes. By reference to the other seven sections (1, 2, 2A, 2B, 2C, 3 and 4) the notice set out, in relation to each, the original date for completion; any extension of time; the date of partial possession; the notices of non-completion; the notices of sectional completion; the clause 2.29 notices; any responses by GTB; and a brief summary of how and when the dispute crystallised.

18. At section 5 of the notice of adjudication, there was a claim for liquidated damages. That was in precisely the same terms, albeit broken down section by section, as set out in paragraph 15 above (namely the gross amount of £5,180,410.59 and a net amount of £3,395,010). At paragraph 5.3 of the notice, Mailbox said that their primary claim was for the gross amount of £5,180,410.59, but they said that if they were to be limited to their earlier notices, the alternative claim was in the sum of £4,308,299.73. In section 6 those money claims were then set out.

3.3 The Progress of the Adjudication

19. The Referral Notice was served on 25 August 2016. It did not add anything of substance to the notice of adjudication.

20. On 30 August 2016, GTB's solicitors sought an extension of time to the adjudication timetable. That said that GTB "will be contesting these liquidated damages in light of its entitlement to extensions of time. GTB will therefore require time to consider its position and make detailed submissions in respect of extensions of time under the contract." On that basis, it sought an extended timetable for the adjudication.

21. In their Response, GTB said at paragraph 1.8 that they had been delayed due to a number of relevant events that gave rise to an entitlement to an extension of time. Reference was made to the claims and letters set out in **Section 3.1** above. At paragraph 1.20 the Response went on to say this:

> "Mailbox refuses to acknowledge GTB's self-evident entitlement to extensions of time. GTB will very shortly submit its full extension of time submission (further to the interim ones that have been submitted so far) that addresses all Relevant Events in respect of the Project and substantially covers the period of delay. If Mailbox does not properly recognise GTB's entitlement as set out in that full extension of time submission, then separate dispute resolution proceedings will follow. Meantime in this Adjudication, GTB wishes the Adjudicator to take account of the following points in order to (i) determine GTB's entitlements to extension of time for them and (ii) highlight Mailbox's wrongful approach to claiming LADs in this Adjudication:
>
> (a) Delayed start due to lack of Employer fire strategy documentation;
>
> (b) Mall steel beams fire protection;

> (c) Failure by Mailbox to grant possession of section 4 and its impact on section 3."

The Response goes on to develop the detailed case in relation to these three relevant events. No other relevant events were relied on by GTB.

22. In my view, this was an odd (and potentially risky) approach for GTB to adopt. None of the pre-adjudication correspondence had sought to limit their response to the claim for liquidated damages in this way: on the contrary, as set out in **Section 3.1** above, the response was broadly-based. Moreover, to identify relevant events at (a) and (b) above, but not sections of the works, was particularly unhelpful: not only had it not been done in that way before, but it failed to acknowledge that the detailed claims for extensions of time on sections 1 and 2C, which had been provided to Mailbox well before the termination and so were on any view part of the crystallised dispute, had gone far beyond the consequences of the two specific events noted at (a) and (b).

23. Mailbox took issue with GTB's approach in their Reply. They disputed GTB's case "that it is entitled to cherry-pick various Relevant Events for the purposes of this Adjudication but submit further applications for extension of time as and when it sees fit in separate proceedings or subsequent adjudication." In many ways, the point which I have to decide in these proceedings was summarised at paragraph 5.3 of Mailbox's Reply as follows:

> "5.3.1 The dispute which the Adjudicator has been asked to decide in this Adjudication is Mailbox's entire entitlement in respect of the totality of the liquidated damages; a decision which encompasses a decision on responsibility for the totality of the pre-termination delays.
>
> 5.3.2 Whilst it is a matter for GTB what material it wishes to rely upon to defend the claim, it cannot limit the Adjudicator's jurisdiction to determine the dispute referred to him by limiting the defence which it puts forward in the Adjudication.
>
> 5.3.3 Furthermore, the Adjudicator's decision in relation to that dispute will be final and binding unless and until finally determined by legal proceedings or by agreement; and
>
> 5.3.4 Thus whilst it is unclear what GTB means by "separate proceedings" GTB cannot bring subsequent adjudication proceedings seeking further extensions of time based on additional Relevant Events to the three upon which it currently relies; to do so would in effect be seeking to re-open the adjudicator's final and binding decision on responsibility for the entirety of the liquidated damages and consequential responsibility for delay."

24. On 27 September 2016, GTB served on DBK their full extension of time claim. They made no formal attempt to incorporate all or any part of this claim in the adjudication proceedings although, as noted in paragraph 27 below, their then solicitors expressly envisaged seeking an extension to the timetable to allow that to happen.

25. On 28 September 2016, GTB's solicitors wrote to challenge that part of the Reply set out in paragraph 23 above. In peremptory terms, they stated that Mailbox's argument "is evidently nonsense; the Notice of Adjudication and Referral Notice is of an interim nature and makes no reference whatsoever to any and all claims for extension of time that GTB may have. The Notice of Adjudication and Referral Notice do not put before you, and they do not ask for a decision on, responsibility for the totality of such pre-termination delays."

26. As I pointed out during the hearing, the expression 'pre-termination delays' is meaningless since, self evidently, a delay cannot happen after termination. The letter of 28 September went on to make GTB's position plain:

> "Those Notices are clearly only concerned with the narrow issue of the interim sum calculated by reference to the Contract's liquidated damages provisions specifically relating to a particular point in time during the course of the project. GTB's Response to that narrow issue put forward by the Notices took in three specific events upon which both Mailbox and GTB had already exchanged information (but not the Blackrock report submitted within the Reply). The Response did not put before you all entitlements GTB has to adjustment of the Contract completion date. Thus it is clear that Mailbox is wrong when it asserts the disputes submitted to this Adjudication "encompasses a decision on the responsibility for the totality of pre-termination delays."

That passage summarises GTB's position in the hearing before me.

27. The point continued to be batted back and forth. On 30 September 2016, the adjudicator said that, for the guidance of the parties, he considered that his decision "should be reached upon the totality of the matters referred to me and has not been limited in scope by GTB's submissions". I respectfully agree with that.

28. In response, on the same day, GTB's solicitors expressly envisaged the possibility of dealing with the entirety of GTB's extensions of time claim in the adjudication, but noted that "it would be fundamentally inequitable to impose the current timetable which is wholly inadequate and would fail to accommodate any proper consideration of the extension of time points that GTB has put forward to Mailbox out with this adjudication." The letter said that, if the extension claim was to be dealt with in full, the adjudicator would have to disregard the revised timetable and impose a much lengthier and comprehensive timetable. However, they did not follow up that suggestion with any amended or proposed extended timetable, so the timetable was not amended.

29. On 17 October 2016, the adjudicator dealt with a number of jurisdictional challenges that had been made by GTB. On the issue with which I am concerned, he said:

> "Mailbox's Referral Notice does not require me to deal with any requests from Galliford for extensions of time other to note those extensions that had already been granted.
>
> Galliford's defence expressly requests me to only consider their requests for extensions of time on the following issues:
>
> (a) Delayed start due to lack of Employer Fire Strategy documentation
>
> (b) Mall steel beams fire protection
>
> (c) Failure by Mailbox to grant possession of Section 4 and its impact on Section 3
>
> I therefore intend to deal in the Decision with the above three requests for EOT and no others."

30. Following a further jurisdictional point raised by GTB concerned with Mailbox's alternative claim, (which was again resolved by the adjudicator in Mailbox's favour), the adjudicator produced his detailed decision on 6 November 2016.

3.4 The Decision

31. The adjudicator summarised the dispute at section 5 of the Decision:

> "5.1 This section is intended to provide an outline summary of the dispute and is not an exhaustive and comprehensive recital of the parties' submission.
>
> 5.2 This dispute concerns Mailbox's claim for the payment of LADs from GTB.
>
> 5.3 The progress of the works was the subject of numerous and significant delays which resulted in sections of the project achieving practical completion later than the dates inserted into the contract.
>
> 5.4 Mailbox granted GTB extensions of time for some sections of the works, however they consider that GTB are responsible for the remaining delays which are considerable.
>
> 5.5 GTB contend that they are entitled to further extensions of time and deny any liability for LADs.
>
> 5.6 Mailbox have now terminated GTB's contract."

The adjudicator then set out in a schedule the contract possession dates for each section, the actual possession dates, the contract completion dates, the revised completion dates, the actual completion dates, the extent of delay, and the amounts of liquidated damages.

32. At section 9, he dealt with the numerous jurisdictional challenges raised by GTB. At 9(c) he said:

> "(i) GTB had elected to limit their defence of the claims for LADs made in this Adjudication for three relevant events and argued that the Adjudicator's Decision should therefore be similarly restricted.
>
> (ii) I concluded that the scope of the Adjudication was determined by the matter stated in the notice and referral and that GTB could not unilaterally restrict the scope merely by limiting the issues upon which they chose to run their defence."

At section 9(d) he rejected GTB's argument that in some way his decision would be interim only, and instead ruled that it would be final and binding in the usual way.

33. At section 12.22 he dealt with the extensions of time, focusing on the three relevant events to which he had referred in his email of 17 October (paragraph 29 above). He went on:

> "12.25 It was accepted that GTC had complete freedom to mount their defence on any grounds they chose and were not obliged to address all of the matters raised in Mailbox's referral.
>
> 12.26 However, Mailbox did not agree that GTC could unilaterally reduce the scope of the Adjudication from that which was defined in the Notice of Adjudication by merely limiting the grounds upon which they mounted their own defence.
>
> 12.27 I agree with Mailbox's position; please refer to the section dealing with jurisdictional challenges for further commentary."

At paragraph 12.160 the adjudicator said that he had not taken into account any request for extensions of time other than those relating to the three specific relevant events which GTB relied on.

3.5 Events Thereafter

34. GTB did not pay the large sums awarded by the adjudicator to Mailbox by way of liquidated damages. Mailbox issued enforcement proceedings. GTB resisted them. On 26 January 2017, O'Farrell J rejected GTB's arguments and gave judgment in Mailbox's favour.

35. On 24 February 2017, GTB made an application to stay payment of the judgment sum to Mailbox. That application too was unsuccessful.

36. These proceedings were commenced on 13 April 2017. In them, Mailbox seek wide-ranging declarations that:

> "1.1 The decision of Mr Curtis dated 6 November 2016 (corrected on 9 November 2016) determined the totality of:
>
> (i) The Claimant's entitlement to liquidated damages; and
>
> (ii) The Defendant's entitlement to extensions of time; arising out of or in connection with the Building Contract and is (temporarily) final and binding in respect of those matters subject to any subsequent court proceedings; and as a result
>
> 1.2 No dispute has arisen or can arise which is referable to adjudication which relates to the defendant's entitlement to extensions of time arising out of or in connection with the Building Contract in that any subsequent adjudication will have no jurisdiction to determine such a dispute which is already the subject of a (temporarily) binding decision.
>
> 1.1 (*sic*) The decision of Mr Curtis dated 6 November 2016 (corrected on 9 November 2016) prevents the Defendant from bringing a subsequent adjudication seeking any extension of time such that the subsequent adjudicator has no jurisdiction."

37. The proceedings were issued because Mailbox suspected that GTB were going to commence a second adjudication which dealt with questions of delay. They were right: on precisely the same day (13 April) GTB commenced a second adjudication. Mr Curtis was again appointed adjudicator. Whilst the principal focus of the second adjudication concerned the lawfulness or otherwise of the termination (the sub-heading of the notice of adjudication is "wrongful termination"), one element of that debate concerns the argument as to whether or not GTB were proceeding regularly and diligently with the works. That argument in turn required a consideration of the contractual completion date and any extension of that date (see ***West Faulkner Associates v London Borough of Newham*** [1992] 61 BLR 81). Thus, as part of the debate about the validity or otherwise of the termination, GTB are alleging that they are entitled to a significant extension of time on section 3. The extension of time sought would go well beyond that which was considered and granted by the adjudicator in the first adjudication.

38. On the issue as to the potential overlap between the first and the second adjudications, in an email of 2 May 2017, the adjudicator reached the following conclusions:

> "In the First Adjudication, I was asked to decide upon Mailbox's entitlement to LAD's. Although I was not asked directly to determine Galliford's entitlement to any further EOTs I accept Mailbox's contentions that it was necessary for me to take this into account in my calculations of the entitlements for LAD's. However, I made it clear in my

> Decision that I was only doing so on the basis of the three relevant events expressly claimed by Galliford. I had not decided any EOT entitlement for any other relevant events.
>
> My initial review of Galliford's Referral Notice indicates that they have now included in this Adjudication other relevant events that were not referred to in the First Adjudication.
>
> I am therefore persuaded by Galliford's arguments that I can consider these additional relevant events in this Adjudication."
>
> GTB contend that a consideration of EOT is appropriate in order to deal with the overall matter of the alleged wrongful termination of the Contract.
>
> I fully appreciate Mailbox's arguments to the contrary but I am not persuaded by them.
>
> I do however accept Mailbox's specific point that I do not have the jurisdiction to change the findings in the First Adjudication regarding the EOT for the delayed possession of section 4 (13 weeks and 6 days) and its impact upon the completion date for section 3…
>
> I also take GTB's point that this Adjudication concerns the alleged wrongful termination of the contract. As such any question of any potential further EOTs only forms a subset of their contentions in support of their other arguments.
>
> In essence GTB contend that I would not have to 'decide' upon any potential EOTs but merely to acknowledge their merit as evidence of GTB proceeding diligently etc with the works."

39. On the basis of that email, it seems that the adjudicator, trying to steer a fine line between the opposing submissions, was anxious to emphasise that the second adjudication was primarily focused on the issue of termination, in respect of which any arguments about delay/extensions were just "a subset". But it also appears that he did not regard himself as bound by his first decision as to delay, save in respect of the three relevant events which he had addressed in his decision. One of the issues for me is whether or not that conclusion is correct.

4. THE APPLICABLE PRINCIPLES OF LAW

4.1 General

40. In determining the nature, scope and extent of any dispute referred to adjudication, the court will have particular regard to the notice of adjudication: see ***Stellite Construction Limited v Vascroft Contractors Limited*** [2016] EWHC 248 (TCC) at paragraph 48.

41. However, the court does not just look at the notice of adjudication in isolation. It is necessary to consider the notice in the context of the background facts (***Stellite*** at

paragraph 48). Moreover, when addressing the issue as to what was decided in an earlier adjudication, the court must have regard to what the first adjudicator actually decided, because that determines how much or how little remains available for consideration by the second adjudicator (see ***Harding v Paice*** [2015] EWCA Civ. 1231 at paragraph 57).

42. There are two particular lines of authorities relevant to the present application. One is concerned with the extent to which a defending party is obliged/entitled to take every available defence; and the other concerns the guidelines applicable to serial adjudication. I deal with those authorities in turn at **Sections 4.2** and **4.3** below.

4.2 Every Available Defence

43. In ***Cantillon v Urvasco*** Akenhead J said at paragraph 54:

> "It is, I believe, accepted by both parties, correctly in my view, that whatever dispute is referred to the Adjudicator, it includes and allows for any ground open to the responding party which would amount in law or in fact to a defence of the claim with which it is dealing."

On a similar point, in ***Pilon v Breyer*** [2010] EWHC 837 (TCC) at paragraph 25, I said that:

> "…a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set-off), and thus such defences will ordinarily be encompassed within the notice of adjudication."

44. In ***Working Environments***, Akenhead J expanded on this principle at paragraphs 23(d) and 24 of his judgment as follows:

> "23…(d) In my view, one should look at the essential claim which has been made and the fact that it has been challenged as opposed to the precise grounds upon which that it has been rejected or not accepted. Thus, it is open to any defendant to raise any defence to the claim when it is referred to adjudication or arbitration. Similarly, the claiming party is not limited to the arguments, contentions and evidence put forward by it before the dispute crystallised. The adjudicator or arbitrator must then resolve the referred dispute, which is essentially the challenged claim or assertion but can consider any argument, evidence or other material for or against the disputed claim or assertion in resolving that dispute.
>
> 24. The corollary of this is that, if a defending party has not prior to the adjudication and does not put forward a particular defence, the adjudicator does not have jurisdiction to address such a defence even if it seems

> a sensible thing to do to save time and cost later. However, if the crystallised dispute referred to adjudication encompasses a particular defence, the defending party cannot withdraw that defence during the adjudication to fight another day, so to speak, on that particular defence."

45. In that case, Greencoat's deductions from sums otherwise due to WE had been debated before the dispute was referred by WE to adjudication. Greencoat argued that they were entitled to withdraw their reliance on these deductions in the adjudication (doubtless for some tactical reason that remains obscure). One of the items was for liquidated damages which had been unquantified by Greencoat before the commencement of the adjudication but which was subsequently identified as being worth, on their case, £120,000. Akenhead J said that liability for liquidated damages was something which, prior to the adjudication, Greencoat had identified as a cross-claim, to be set off against what would otherwise have been payable to WE. He found that this cross-claim was therefore part of the crystallised dispute, even though the quantum of the cross-claim had not been identified. Thus he concluded that Greencoat could not withdraw the element of the defence of set-off relating to liquidated damages, because it was part of the crystallised dispute that had been referred to adjudication.

46. Given the issue in the present case was concerned with liquidated damages on the one hand, and extensions of time on the other, I should, with some diffidence, refer to an older decision of mine, ***William Verry (Glazing Systems) Limited v Furlong Homes Limited*** [2005] EWHC 138 (TCC). In that case, I concluded that the notice of adjudication referred a dispute to the adjudicator as to whether or not the existing extension of time that had been granted was correct. I went on to say at paragraph 12:

> "Furthermore, such a broad definition of the extension of time dispute was entirely consistent with the reference to the adjudicator of the dispute about Furlong's entitlement to liquidated damages. The adjudicator could not decide Furlong's existing entitlement to liquidated damages without first deciding Verry's existing entitlement to an extension of time. The two have to be considered together."

4.3 Serial Adjudication

47. The authorities dealing with serial adjudication are unusual in construction adjudication, because the three leading cases all emanate from the Court of Appeal.

48. The first in time is ***Quietfield***. In that case, the contractor Vascroft made a limited application for an extension of time which it then referred to adjudication and lost. Quietfield started a later adjudication claiming liquidated damages and in response, Vascroft relied on a much broader claim for an extension of time. Quietfield successfully persuaded the adjudicator that he should now have no regard to Vascroft's broader extension of time claim because that entitlement had been decided in the first adjudication. However, their application for summary judgment was dismissed by Jackson J (as he then was) on the basis that the adjudicator should have

had regard to the detail of the broader claim. The Court of Appeal agreed. May LJ said:

> "31. Section 108(3) of the 1996 Act and paragraph 23 of the Scheme provide for the temporary binding finality of an adjudicator's *decision*. More than one adjudication is permissible, provided a second adjudicator is not asked to decide again that which the first adjudicator has already decided. Indeed paragraph 9(2) of the Scheme obliges an adjudicator to 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.
>
> 32. So the question in each case is, what did the first adjudicator decide? The first source of the answer to that question will be the actual decision of the first adjudicator…"

49. He concluded on the facts that the first adjudication had been a limited dispute, and that there was nothing to stop Vascroft from relying on the second, broader extension of time claim as a defence to Quietfield's liquidated damages claim in the second adjudication. Dyson LJ reached the same conclusion in the Court of Appeal, saying in respect of extension of time claims generally that there was nothing in the express language of the contract which prevented the contractor from making good the deficiencies of an earlier application in a later application. He referred to the rule preventing a second adjudicator from reconsidering a matter in the first adjudication as being designed to protect respondents "from having to face the expense and trouble of successive adjudications on the same or substantially the same dispute".

50. In ***Harding v Paice*** [2016] BLR 85, the claim in the third adjudication was for the amount claimed in Harding's final account. That claim was put either on the basis that there was no payless notice, or alternatively that the sum claimed was properly due under the contract. The adjudicator found in favour of Harding on the grounds that there was no payless notice. Subsequently, the question arose as to whether another adjudicator could deal with the proper value of the account, because that had not been expressly dealt with in the earlier adjudication. Edwards-Stuart J and the Court of Appeal concluded that it could. Jackson LJ said at paragraph 58:

> "Parliament cannot have intended that if a claimant refers twenty disputes or issues to adjudication but the adjudicator only decides one of those disputes or issues, future adjudication about the other matters is prohibited."

51. Finally, there is ***Brown v Complete Building Solutions Limited*** [2016] BLR 98. In that case the Court of Appeal decided that the question was whether the dispute that had been previously resolved was the same or substantially the same as the dispute in the subsequent adjudication. That was a question of fact and degree. Simon LJ referred to ***Quietfield*** and ***Harding*** and said that those authorities "indicated that the starting point is the adjudicator's view of whether one dispute is the same or

substantially the same…it is important that the court gives due respect to the adjudicator's decision." No additional point of principle arises out of the judgment in ***Brown***.

5. ANALYSIS

5.1 Introduction

52. I have found it helpful to analyse the issues between the parties by considering first the claim for liquidated damages, then the claims for extensions of time, and then the claim for wrongful termination. By doing that, I believe that a clear path through the difficulties created by GTB's tactics and strategy in this case can be discerned.

5.2 Mailbox's Entitlement to LADs

53. The first point to make is that the issues in this case, and therefore my answers to them, arise out of a contract where the work has come to an end. Nothing has been done under this contract since 1 March 2016. That is important, because this is not a situation where issues as to liquidated damages and extensions of time will change or alter as a result of ongoing or future events on site. There are and will be no such events.

54. This starting-point is important in another way as well. As noted in **Section 3.1** above, claims and cross-claims relating to delay and extensions of time were made between 12 May 2015 and 18 March 2016. Thereafter, there was a further period of five months before the commencement of the first adjudication in August 2016. In that adjudication, the claim for liquidated damages was precisely that which had been set out by DBK (and not paid by GTB) on 18 March 2016 (paragraph 15 above). All of the arguments in the first adjudication, therefore, were in respect of events which had happened months or years earlier.

55. In my view, it is beyond argument that Mailbox are entitled to retain the entirety of the liquidated damages awarded by the adjudicator (and the subject of the enforcement judgment of O'Farrell J), unless and until the liquidated damages claim is challenged in court and the court reaches a contrary view on the detailed claims. That is the effect of the decision in the first adjudication. That entitlement cannot be reduced or modified either under the contract or in a subsequent adjudication.

56. At one point Mr Stansfield QC argued that all that the adjudicator had done was to decide, on an interim basis, Mailbox's entitlement to liquidated damages under clause 2.29 of the contract. He submitted that, at the final account stage, that entitlement could be adjusted in accordance with clause 8.7.4 (paragraph 6 above).

57. I do not accept that submission for two reasons. First, the adjudicator expressly rejected GTB's argument in the first adjudication that in some way his decision was interim only (paragraph 32 above). Secondly, having decided that Mailbox were entitled to a significant sum by way of liquidated damages, the adjudicator's decision is binding on the parties unless and until it is overturned by the court. So, even if there are final account discussions under clause 8.7.4, Mailbox are entitled to say that the issue of liquidated damages has been decided, and that the figure calculated by the

adjudicator must simply be fed into the overall calculation, without any change or modification.

58. In any subsequent adjudication, it would be impossible for the adjudicator to reach any other view as to Mailbox's entitlement to liquidated damages. Any alteration would be a plain breach of section 9(2) of the scheme and contrary to the principles set out in ***Quietfield*** and the other cases noted in **Section 4.3** above.

5.3 GTB's Entitlement to an EoT

59. The next question is the effect of the adjudicator's decision on GTB's entitlement to an extension of time. The first point to make is that a contractor's claim for an extension of time under the JCT standard forms of contract is defensive. An extension of time acts simply as a defence to a claim that the employer might otherwise bring for liquidated damages due to delay. An extension of time brings no other benefit. It does not carry money. If the contractor wants to claim loss and expense as a result of delay, he has to look at other clauses of the contract (under this standard form, the loss and expense provisions are at clause 4.20 onwards) and has to put forward a very different sort of claim. For one thing, the relevant events which trigger entitlement are different.

60. During the course of the hearing, there were numerous references to GTB's claims for an extension of time as if they were separate from and independent of the employer's claims for liquidated damages for delay. They are not. Although there is both an entitlement and an obligation on the part of a contractor to make such claims if it wants the employer's agent to take them into account when considering the employer's entitlement to liquidated damages, they are statements of a positive defence to the employer's money claim for delay, nothing more. So in a case as here, where the employer's entitlement to liquidated damages has been fixed, a claim for an extension of time has become redundant.

61. The question posed in ***Cantillon*** and ***Working Environment*** requires an analysis of whether or not, in this case, the dispute which had crystallised by 19 August 2016 involved the whole of Mailbox's entitlement to LADs and, by way of defence to that claim, the whole of GTB's entitlement to extensions of time. In my view, the crystallised dispute involved both of these elements. The exchanges which I have summarised in **Section 3.1** above make clear that the stated positions of the parties, prior to the commencement of the first adjudication, related to the delays which had occurred on all seven sections of the work which were late. They were not limited to certain sections only; they certainly were not limited to just three events.

62. In the pre-adjudication correspondence, GTB talked generally about their entitlement to extensions of time. They identified relevant events in respect of each delayed section of the works. No section that was in delay was the subject of an admission to the effect that the delay, or even part of it, was GTB's responsibility. Moreover, once the adjudication started, GTB's then solicitors made clear that the claim for liquidated damages would be defended by reference to GTB's entitlement to extensions of time (paragraph 20 above). There was never any qualification to these statements of defence.

63. It is of course true that GTB's detailed claims for an extension of time were more advanced on some sections than others. That is not uncommon. But that was a matter for GTB; given that at least 5 months had passed since any work had been done at all, and that the claims related to events that went back months and even years, GTB were taking the risk that their leisurely approach in putting together detailed extension claims might rebound on them. The fact that, for example, the extension claim in respect of section 1 had been advanced in detail, whilst the claims on some of the other sections were more sketchy, did not mean that the crystallised dispute did not encompass all aspects of delay, across all the sections of the work.

64. Accordingly, by reference to the material outlined in **Section 3.1** above, I find that the dispute referred to the adjudicator by the notice of adjudication on 19 August 2016, was a dispute about liquidated damages (and therefore delay) across all the sections of the work. It therefore encompassed all of Mailbox's claims for liquidated damages, and all of GTB's entitlements to an extension of time. In this way, the crystallised dispute included all time-related issues, in accordance with the approach in ***Cantillon*** and ***Working Environment***.

65. In my view, that is also a conclusion in accordance with commercial common sense. It would be absurd if the adjudicator was obliged to work out the parameters of the dispute referred to him by going through the pre-adjudication correspondence between the parties in excruciating detail, concluding that, for instance, the claim for an extension on section 2C was detailed, and therefore within jurisdiction, whilst the claim on section 2B was in outline only, and therefore outside his jurisdiction. I refer back what I said in ***William Verry*** (paragraph 46 above). In general terms, an adjudicator cannot sensibly decide an entitlement to liquidated damages without first deciding the contractor's entitlement to an extension of time. In an ordinary case, they fit seamlessly together, for the reasons that I have explained.

66. Given that I have found that the crystallised dispute between the parties concerned responsibility for the entirety of the delays, it follows that GTB were not entitled to seek to defend themselves by reference to just a few of the potential relevant events, and keep others back for another day. That would be contrary to paragraph 24 of Akenhead J's judgment in ***Working Environments***, because it would involve the defending party withdrawing part of its defence during the adjudication in order to rely on it another day. That is not an approach which can be permitted.

67. Although the adjudicator only considered the three relevant events relied on by GTB, that was because they were the only positive defences which GTB chose to run in the first adjudication. They were clearly in a position to do much more: the detailed extension claims were ready on 27 September 2016 (paragraph 24 above) which was half-way through the adjudication, and their solicitors expressly contemplated an extended timetable to allow those claims to be considered, although they failed to follow up their own suggestion. Instead, they chose to stick to a high-risk policy of attempting to dictate which of their extension claims were in and which were not. In the event, that has proved an unwise course.

68. Mr Stansfield QC suggested that a conclusion that GTB could not raise fresh claims for extensions of time in the second adjudication would be contrary to the decision in ***Quietfield***. He said that ***Quietfield*** was authority for the proposition that a contractor had an unfettered right to run different extensions of time claim in different

adjudications. I do not agree: ***Quietfield*** is a very different case on the facts. In ***Quietfield***, in answer to the employer's claim for liquidated damages, the contractor was entitled to raise its full entitlement to an extension of time. The mere fact that, in an earlier adjudication, the contractor had raised a narrow claim which had been unsuccessful did not limit the defence it could advance in answer to the employer's liquidated damages claim. So here, in answer to Mailbox's claim for liquidated damages, GTB were entitled to raise the entirety of their extension of time claims in the first adjudication, just as they had done in the pre-adjudication correspondence. That they chose not to was a matter for them, and the consequences of their choice are not affected by the decision in ***Quietfield***.

69. Similarly, I consider that ***Harding v Paice*** is also a case on very different facts. It was, with respect, common sense that, because the earlier adjudicator had dealt with the claim on one ground only, the claiming party was not shut out from making the claim on the alternative ground at a later date. There, the earlier adjudicator had not needed to look at the detail of the claim, so the later adjudicator could do just that. In the present case, they were inextricably linked; the adjudicator could not decide the liquidated damages due without deciding all applicable extensions.

70. It is worth looking at one part of the second adjudication to illustrate the difficulties created by GTB's approach. At paragraph 3.1.5 of the notice of adjudication in the second adjudication, GTB seek an extension of time in relation to section 3 down to 19 July 2016. In the first adjudication, the adjudicator decided that they were entitled to an extension of time on section 3 to 13 September 2015, and calculated the liquidated damages accordingly. Accordingly, in the second adjudication, GTB are asking the adjudicator to change the date that he decided in the first adjudication, which on the face of it would open up the liquidated damages already awarded by the adjudicator. In my view, they are not entitled to do that. In the words of Dyson LJ in ***Quietfield***, Mailbox should be protected "from having to face the expense and trouble of successive adjudications on the same of substantially the same dispute."

71. More widely, Mr Stansfield QC complained that, if GTB could not seek further extensions, it would mean that the employer could force the contractor to make its extensions of time claims before the contractor was ready. There are two answers to that. First, since either party is entitled to adjudicate at any time, there is always a risk that the defending party is caught on the hop by the claiming party's notice of adjudication. In my view, this is simply a feature of the rough and ready world of construction adjudication (a comment made repeatedly in the cases) and it cannot be a principled answer to the approach that I have set out.

72. In addition, I consider that that criticism is inapplicable here in any event. As I have noted, there was five months between the contract coming to an end and the commencement of the adjudication proceedings. That was more than enough time for GTB to formulate any further extension of time claims that they wished. After all, clause 2.24 makes plain that notices in relation to relevant events must be given 'forthwith', and that any consequential claims for extensions of time must be provided at the same time or 'within 21 days' (paragraph 4 above). On any view, therefore, GTB had had plenty of time to formulate their detailed claims long before Mailbox started the adjudication.

73. One of the underlying themes of Mr Stansfield QC's submissions was that, in some way, if GTB could not raise in a subsequent adjudication other claims for an extension of time, they were being unfairly deprived of rights to which they were entitled under the contract. He said GTB should be able to choose what it put forward and when. Again, I do not agree.

74. First, there is no question of unfairness, since this result has arisen from the tactical choices made by GTB. Secondly, the adjudicator rightly said in the first adjudication (paragraph 27 above) that GTB could not restrict the scope of the dispute in the first adjudication by their submissions, where they only put forward three events. Thirdly, my conclusion in relation to extensions of time means only that GTB are not entitled in a second adjudication to raise matters which they could have but chose not to rely on in the first. But they can, of course, raise those matters in court proceedings challenging the adjudicator's decision in that adjudication. Thus, this is really a dispute about forum only: there is no risk of GTB's substantive rights being affected, unlike the position in the recent case of ***Tarmac Ltd v Costain Holdings Ltd*** [2017] EWHC 319 (TCC).

75. Finally, there was a suggestion that O'Farrell J had indicated in her earlier rulings that she was sympathetic to GTB's position, and reference was made to what she had said. It was accepted that she had not ruled on the point, and I do not consider that she was doing anything other than commenting on the factual background as it was outlined to her.

76. For all these reasons, therefore, I conclude that GTB are not entitled to seek any further extensions of time in the second adjudication. To the extent that the adjudicator reached a different view – his email noted at paragraph 38 above is not entirely clear on the extension of time issue – I consider that, for the avoidance of doubt, he was wrong to do so.

5.4 Termination

77. However, that is not the end of the issues raised by this application. I recognise that the second adjudication is principally about the termination of Mailbox's employment under the contract. One aspect of that termination is the question of whether or not GTB were proceeding regularly and diligently with the work in section 3. Thus, the delay to section 3 is relevant to the termination dispute.

78. In my view, Mailbox cannot argue that the dispute as to termination was in any way addressed in the first adjudication. It simply was not a matter that arose, either in the pre-adjudication correspondence, or in the notice of adjudication. It was not part of the crystallised dispute decided by the adjudicator. On the face of it, therefore, in the second adjudication, GTB ought to be entitled to take whatever points they like about their regular and diligent performance of the work in section 3, because that is not a matter which the adjudicator had to or could consider in the first adjudication.

79. Mailbox argue that, because an extension of time on section 3 has now been fixed, the issue of the regular and diligent performance of the work in section 3 can only be considered by reference to that finding. I do not agree. Such an approach is contrary to ***Quietfield*** because it would prevent the contractor in the second adjudication from relying on matters which did not arise, directly or by implication, in the first

adjudication. Since the rights and wrongs of the termination, and the related question of GTB's regular and diligent performance, did not arise in the first adjudication, it would be wrong to hobble both GTB and the adjudicator from considering that issue by ruling that those issues can only be decided by reference to the extended date set in the first adjudication. Although, in one sense, it might again be said that that is one of the risks that GTB chose to run because of their tactical decision in the first adjudication, I consider that this falls on the other side of the line. There is a real risk of injustice if the debate about termination in the second adjudication was to proceed in that artificially constrained way.

80. So in my view, the answer on this last aspect of the application is clear. GTB are not entitled to a different extension of time in respect of section 3. But in respect of the termination/repudiation dispute, they are entitled to rely on all the facts and matters available to them to demonstrate that they were proceeding regularly and diligently with the work at the time of the termination. It is irrelevant if that evidence is the same as or similar to that which they may subsequently deploy in any court proceedings to demonstrate how and why the existing extension of time is wrong. Moreover, Mailbox cannot complain about this because they have suffered no detriment: they are retaining the full amount of the liquidated damages in any event.

81. So the adjudicator must take all facts and matters into account in reaching his decision as to the regular and diligent performance of the works. In that way, the adjudicator can address the real issues in respect of termination (which did not arise in the first adjudication), whilst Mailbox's financial entitlement as a result of that first adjudication remains unaffected. Moreover, Mailbox will not have to address the same issues all over again in the second adjudication because the question of the regular and diligence performance of the work, and whether it justified termination, did not arise in the first.

82. Finally, I note that, in substance, this approach seems to chime with the adjudicator's own view, as set out at paragraph 38 above. That is important, for the reasons set out in ***Brown***.

6. CONCLUSIONS

83. Mailbox are entitled to the sums awarded by the adjudicator by way of liquidated damages and can retain those sums unless and until the adjudicator's decision is overturned by the court.

84. Similarly, GTB are not entitled to any extensions of time beyond those awarded by the adjudicator in the first adjudication unless and until those are modified or altered by the court.

85. However, in respect of the principal dispute in the second adjudication, concerned with termination, GTB are entitled to deploy all the material that they would wish in order to persuade the adjudicator that they were carrying out the works regularly and diligently at the time of termination. To the extent that that material may be relied on to explain why, in any subsequent court proceedings, GTB are entitled to a longer extension of time than that awarded by the adjudicator, that is immaterial. It is important to ensure a full debate about the termination in the second adjudication, without artificial and possibly unjust restrictions.

86. The precise wording of any declarations arising out of this Judgment ought now to be capable of agreement between the parties.