Bresco Electrical Services Ltd v Michael J Lonsdale – The Supreme Court Judgment

Analysis written by George Woods.

The Supreme Court has handed down its decision in Bresco Electrical Services Ltd v Michael J Lonsdale [2020] UKSC 25. It has returned the law to where it was before the first instance judgment and has made a firm statement that there is jurisdiction for insolvent construction companies to refer a dispute to adjudication. In the unanimous decision of the Court, Lord Briggs concluded that the operation of insolvency set off and the adjudication of construction disputes are not only compatible, but they are to be encouraged. Fiona Sinclair QC and Thomas Crangle of 4 Pump Court appeared on behalf of Michael J Lonsdale, instructed by Fladgate LLP.

This decision is a departure from the position articulated by Coulson LJ in the Court of Appeal that while an adjudicator had jurisdiction to determine such a dispute, there was an incompatibility between the adjudication and the insolvency regimes such that there was a right to an injunction to halt the adjudication. Where there was a cross claim, a decision would be unlikely to be enforced and a reference to adjudication would therefore be 'an exercise in futility.' This position, subsequently applied in a number of cases, will be replaced by the Court's encouragement of adjudication as a 'good in itself'. This is notably different to the position taken by three former Judges in Charge of the TCC, who are referred to in the judgment.

The Supreme Court's encouragement of adjudication goes beyond its application in situations of insolvency set off, as the Court conducted a review of the adjudication regime as a successful mainstream dispute resolution mechanism, providing de facto final resolution of most disputes referred to an adjudicator. In this, the Supreme Court considered that adjudication should not be considered simply as a mechanism for solving cash flow, but recognised its broad role in resolving construction disputes.

This decision is timely with the likely increase in insolvency within the construction industry at present. There remain many of the hurdles to enforcement that were articulated by Coulson LJ as the reason for his decision in the Court of Appeal, and while insolvency professionals will likely welcome the Supreme Court's decision for the opportunity to use adjudication to resolve disputes, there must be a recognition of the constraints on summary enforcement that remain.

The background to the dispute may be shortly stated. In 2014 Bresco and Lonsdale entered into a construction contract. In 2015 Bresco went into creditors' voluntary liquidation. There were a number of claims and cross claims.

The adjudication in this matter came before the Court on a question of jurisdiction, and Fraser J at first instance acceded to Lonsdale's case that an adjudicator lacked jurisdiction because of the automatic operation of insolvency set-off. He granted Lonsdale an injunction to restrain Bresco from bringing the claim to adjudication. Once the liquidation commenced, all claims and cross-claims under the construction contract ceased to exist and were replaced by a single claim to the balance.

The Court of Appeal reversed Fraser J's decision that the adjudicator lacked jurisdiction, but it upheld the injunction as set out earlier in this note.

The Supreme Court decision provides a broad overview of the application and the utility of adjudication of construction

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disputes. In the context of the present dispute it addresses what it describes as *'trenchant expressions of the futility of adjudication, and its incompatibility with insolvency set-off,'* but then goes on to hold that such expressions are insufficient as the basis of the grant of an injunction. Parties to a construction contract have rights both by contract and statute to pursue adjudication of a dispute under a construction contract, and these rights should not lightly be restrained. Adjudication provides a widely used and accepted method of dispute resolution, which may be appropriate even where summary enforcement may not be available. Issues of enforcement of an award may be appropriately dealt with an enforcement stage. Interesting potential developments may arise in a number of areas. The Supreme Court hinted at a preference for a wide approach as to what disputes arise "under the contract" – importing the *Fiona Trust* approach from arbitration. It also suggested that a responding party may counterclaim a declaration as to the value of that counterclaim, at least up to the value of the claim, even though the adjudicator would lack jurisdiction to award payment to that party. Finally, and of relevance to liquidators, the Supreme Court endorsed the approach to security for costs as a condition of summary judgment on an adjudicator's decision as developed in ***Meadowside Building Developments Ltd (in liquidation) v 12-18 Hill Street Management Company Ltd*** [2019] EWHC 2651 (TCC). Liquidators who want enforceable decisions from adjudicators will need to be prepared to ring-fence the proceeds of enforcement, and to provide security in respect of the costs of the adjudication award and any adverse costs order in the enforcement proceedings or subsequent litigation.

The Supreme Court's judgment can be found on Bailii.

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