

John Doyle v Erith Contractors Limited [2020] EWHC 2451 (TCC): Insolvency and Construction – The Construction Act strikes back

Case summary written by [Luke Wygas](#).

The case of *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd (Bresco)* saw the TCC and the Court of Appeal agree that insolvent referring parties should not reap the rewards of adjudication. In fact, the TCC said that a referring party facing an adjudication brought by an insolvent party could even get an injunction to restrain that referral.

In *Bresco* the Supreme Court looked at the situation and decided that actually the Construction Act did not expressly carve out insolvent referring parties. Therefore, come one, come all. Much to the disappointment of particularly main contractors and employers, insolvent parties were allowed to enjoy the fruits of adjudications as a quick, if not always accurate, dispute resolution process.

However, given that the temporary binding nature of an adjudication decision is matched by the often temporary nature of a company in liquidation, that was going to cause problems.

So in the case of *John Doyle v Erith Contractors Limited (Doyle)* the TCC has come up with a pragmatic solution which follows to the letter what the Supreme Court has decided. However, the TCC then adds its own specific tests which allows it to, practically, return the position to something much closer to where we were after *Bresco* at first instance.

The facts of the case of *Doyle* are not really enlightening and can hide the wood from the trees. To deal with the fundamental principles involved, it is really sufficient to simply say that an insolvent subcontractor brought an adjudication against a contractor and succeeded in the adjudication. The Court was then left deciding whether to enforce the insolvent subcontractor's decision or not.

Whilst the facts stated above are all that are really necessary to understand the principles, there was more colour to the case, which did not escape the Court. First, the dispute arose from the 2012 Olympics, so there was some serious delay in bringing the adjudication. Second, the claim had been assigned to a third party. Third, the dispute which had been referred was only part of the matters in issue between the parties. All of these points may well have weighed against Doyle in their case to enforce.

In any event, the Court set down five principles which will be applied when an insolvent party seeks to enforce an adjudicator's award (see paragraph 54 of the Judgment).

1. Whether the dispute in respect of which the adjudicator has issued a decision is one in respect of the whole of the parties' financial dealings under the construction contract in question, or simply one element of it.
 - Whether there are mutual dealings between the parties that are outside the construction contract under which

the adjudicator has resolved the particular dispute.

- Whether there are other defences available to the defendant that were not deployed in the adjudication.
- Whether the liquidator is prepared to offer undertakings, such as ring-fencing the enforcement proceeds, and/or where there is other security available.
- Whether there is a real risk that the summary enforcement of an adjudication decision will deprive the paying party of security for its cross-claim.

In essence, unless the adjudication deals with all the outstanding matters between the parties and the insolvent party can offer security for the sums it is to be paid, the impact of *Doyle* is that an insolvent party can now bring an adjudication, but it will not get that adjudication enforced.

The Court also relied on the fact that if the adjudicator's decision should have been enforced then the Court would have granted a stay to that enforcement in any event.

Finally, the Court did fire a shot across the bows of insolvent litigants who delay in bringing these type of adjudications. They could well soon find that they do not have the benefit of the fast track adjudication enforcement regime which other users of the TCC benefit from.

Therefore, whilst responding parties facing adjudications from insolvent referring parties may no longer be able to obtain injunctions to restrain the adjudication, the insolvent referring party has substantial obstacles to climb if it wants to enforce any decision at the end of the adjudication.

Full judgment is [available on Bailii](#).