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Adjudication and Liquidation: Enforcement post *Bresco*

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Introduction

The recent decision of the Supreme Court in the *Bresco* case[1] established that a party in liquidation may pursue a claim in adjudication. The adjudicator does not lack jurisdiction by reason of the fact that the referring party is in liquidation nor by reason of a combination of the referring party being in liquidation and the responding party having a cross-claim or cross-claims. The adjudicator should accordingly proceed to decide the matters referred.

A responding party will not now succeed in seeking an injunction to restrain the continuation of the adjudication, by reason of the fact that the referring party is in liquidation nor by reason of a combination of the referring party being in liquidation and the responding party having a cross-claim or cross-claims.

Bresco is primarily about jurisdiction and whether an injunction should be granted to restrain the continuation of an adjudication; it is therefore of narrow scope. On these narrow points, the position is now clear and simple. *Bresco* is not a case about enforcement of an adjudicator's decision, although dicta in the *Bresco* case will be relevant in enforcement cases. Lord Briggs stated that the court is well placed to deal with the separate question whether the adjudicator's decision should be enforced, as explained in *Bouygues*.[2] The *Bouygues* case accordingly remains important when enforcement is under consideration.

Lord Briggs noted that in some cases of an adjudicator's decision in favour of a party in liquidation, enforcement will be appropriate, for example if there is no dispute about the cross-claim and the claim is found to be in a larger amount. Or the disputed cross-claim may be found to be of no substance. Or, if the cross-claim can be determined by the adjudicator because the claim and cross-claim form part of the same dispute under the contract, the adjudicator may be able to determine the net balance.

It is true that an adjudicator may over-value the net balance in favour of the company in liquidation, so that summary enforcement leaves the respondent having first to establish a true balance in its favour and then pursue it by proof against an under-funded liquidation estate. But that may occur in any liquidation context.

Lord Briggs stated that:

> "The proper answer to all these issues about enforcement is that they can be dealt with…at the enforcement stage, if there is one. In many cases the liquidator will not seek to enforce the adjudicator's decision summarily. In others the liquidator may offer appropriate undertakings such as to ring-fence any enforcement proceeds: see the discussion of undertakings in the *Meadowside* case. Where there remains a real risk

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[1] *Bresco Electrical Services Ltd (in Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25.

[2] *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2001] 1 All E.R. (Comm) 1041; [2000] B.L.R. 522; [2001] 3 T.C.L.R. 2; (2000) 73 Con. L.R. 135; [2000] C.I.L.L. 1673 CA.

> that the summary enforcement of an adjudication decision will deprive the respondent of its right to have recourse to the company's claim as security (pro tanto) for its cross-claim, then the court will be astute to refuse summary judgment."[3]

The purpose of this article is to consider the first case to come before the Technology and Construction Court, following *Bresco* in the Supreme Court, on the question of enforcement of an adjudicator's decision in favour of a company in liquidation.

The writer previously gave a detailed analysis in this journal[4] of *Bresco* at first instance, in the Court of Appeal and in the Supreme Court, together with the other relevant cases on adjudication and liquidation: *Bouygues*, *Enterprise Managed Services*,[5] *Meadowside*[6] and *Balfour Beatty v Astec*.[7] That previous article sets out in detail the background to the consideration in this article of the recent case on enforcement, *John Doyle Construction Ltd v Erith Contractors Ltd*.[8]

The *John Doyle* Case

The Olympic Development Authority engaged BAM Nuttall as management contractor for certain construction works for the Olympic Park for the 2012 Olympic Games in London. BAM engaged Erith for landscaping works and Erith engaged John Doyle to perform all or most of the landscaping works. John Doyle performed a substantial amount of works, but went into administration in 2012 and into liquidation in 2013.

In 2014, John Doyle's liquidators formed the view that there was a valid claim against Erith with a reasonable prospect of success. In 2016, the liquidators entered into a deed of assignment with Henderson Jones, a company that purchases legal claims from insolvent companies (although that is not exactly what happened in this case). The intention was to assign John Doyle's claims against Erith to Henderson Jones, although the assignment did not take effect as a legal assignment because there was a prohibition on assignment in the contract between Erith and John Doyle. The judge, Fraser J, summarised the following points about the deed of assignment:

> "1. The Deed envisaged that the assignment might not lead to an effective legal assignment, and in those circumstances provided that the claims would be held on trust for Henderson Jones;
> 2. Henderson Jones paid JDC £6,500 for the assigned claims, with further payment to JDC dependent upon outcome;

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[3] *Bresco Electrical Services Ltd (in Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25 at [67].
[4] Insolvency and Adjudication: Liquidation (2020) 36 Const. L.J. 503.
[5] *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd* [2009] EWHC 3222 (TCC); [2010] All E.R. (D) 126; [2010] B.L.R. 89; [2010] 26 Const. L.J. 204.
[6] *Meadowside Building Developments Ltd (in liquidation) v 12-18 Hill Street Management Company Ltd* [2019] EWHC 2651 (TCC).
[7] *Balfour Beatty Civil Engineering Ltd v Astec Projects Ltd (in Liquidation)* [2020] EWHC 796 (TCC).
[8] *John Doyle Construction Ltd v Erith Contractors Ltd* [2020] EWHC 2451 (TCC).

3. Henderson Jones had conduct and control of any proceedings pursued in relation to the assigned claims;
4 Recovery of any claims were to be paid to Henderson Jones;
5. 45% of net recovery in those subsequent proceedings (meaning recovery less costs) were to be paid out to JDC by Henderson Jones;
6. Henderson Jones would therefore retain 55% of the net recovery."[9]

The deed of assignment was followed by a deed of agreement, some time after the decision in the *Meadowside* case and was clearly intended to avoid the arrangement between John Doyle and Henderson Jones being found similar to those the *Meadowside* case. The *Meadowside* case was considered in detail in the writer's previous article.[10]

In 2018, the adjudication took place, with John Doyle the claimant in the adjudication and in the enforcement proceedings. In October 2019 judgment was handed down in the *Meadowside* case and in December 2019 the liquidators, Henderson Jones and John Doyle entered into the deed of agreement. Between 2018 and 2020 the *Bresco* case made its way from first instance to the Court of Appeal and then to the Supreme Court.

Fraser J noted that the first matter to be addressed on enforcement would normally be whether the adjudicator's decision is valid, by which he meant made within the adjudicator's jurisdiction and without material breaches of natural justice. In the *John Doyle* case, no such issues arose, but where such issues did arise, as is often the case, they would have to be dealt with first. If resolved in the referring party's favour, the court could then proceed to consider the further issues arising when summary judgment is sought by a party in liquidation.

Fraser J proceeded to a consideration of *Bouygues*, from which he quoted paragraphs 29 to 36, and the *Bresco* decision in the Court of Appeal and in the Supreme Court, from both of which he quoted extensively.

It is clear from *Bouygues* that where a paying party has lost an adjudication to a party in liquidation, a relevant consideration on enforcement is the application of insolvency set-off. The Insolvency Rules (IR) 2016 provide for the taking of an account of the parties' mutual dealings and arriving at a balance one way or the other. This regime is referred to in this article as "insolvency set-off". This regime is sometimes expressed in the case law, for example by Lord Briggs in the *Bresco* case,[11] as the party in liquidation providing security to the other party for its cross-claims. The entitlement to set off mutual debts means that the other party receives credit for 100% of its cross-claims, up to the amount owed to it by the party in liquidation. Without insolvency set-off, the other party would normally merely be an unsecured creditor.

Where the other party's claims overtop the amount owed by the party in liquidation, the claim for the balance as an unsecured creditor will be for such percentage of any balance available for unsecured creditors after realisation of the company's assets and payment to secured

[9] *John Doyle Construction Ltd*, above, at [26].
[10] Insolvency and Adjudication: Liquidation (2020) 36 Const. L.J. 503.
[11] *Bresco Electrical Services Ltd (in Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25 at [60-67].

creditors. Typically the amount available for unsecured creditors in the case of a construction company in liquidation is zero.

The first point Fraser J addressed was whether by "cross-claim" Lord Briggs meant to include a claim by the paying party for final resolution of the dispute decided in the adjudication. Fraser J concluded, correctly in the writer's view, that he did.[12] Otherwise the paying party would (subject to any successful application for a stay of execution) have to pay the sum decided by the adjudicator to the liquidators. That sum would then normally be available to the creditors of the company in liquidation in accordance with the *pari passu* rule; the paying party would have lost its right to insolvency set-off. It would have lost the security for its cross-claim that insolvency set-off provides. A subsequent final determination of the matters decided on a temporary basis by the adjudicator in favour of the paying party would normally be of no practical benefit to the paying party, as there would be no recovery from the liquidators.

So the first important point from the analysis in the *John Doyle* case of the principles applicable when considering an application for summary judgment to enforce an adjudicator's decision in favour of a company in liquidation is that the right to have the underlying dispute resolved with finality is a cross-claim for the purposes of insolvency set-off and is relevant on enforcement. Erith's principal cross-claim in this case was its claim for a final determination of the final account, decided on a temporarily binding basis by the adjudicator.

Fraser J set out the matters to be taken into account by the court when considering an application for summary judgment on an adjudicator's decision in favour of a company in liquidation, given Lord Briggs' dicta in *Bresco* and his approval of Chadwick LJ in *Bouygues* as follows:

> "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.
>
> 2. Whether there are mutual dealings between the parties that are outside the construction contract under which the adjudicator has resolved the particular dispute.
>
> 3. Whether there are other defences available to the defendant that were not deployed in the adjudication.
>
> 4. Whether the liquidator is prepared to offer appropriate undertakings, such as ring-fencing the enforcement proceeds, and/or where there is other security available.
>
> 5. 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."[13]

In connection with point (1) above, Fraser J noted that disputes concerned with service of notices within particular numbers of days known as "smash and grab" would rarely, if ever, be susceptible to enforcement by way of summary judgment by a company in liquidation.

[12] *John Doyle Construction Ltd*, above, at [44-53].
[13] *John Doyle Construction Ltd*, above, at [54].

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Fraser J summarised the circumstances in which summary judgment would be available to a company in liquidation who seeks to enforce an adjudicator's decision in its favour as follows:

> "1. The decision would have to resolve (or take into account) all the different elements of the overall financial dispute between the parties to the construction contract. Where, as here, the dispute referred was the valuation of the referring party's final account, summary judgment will potentially be available (dependent upon the other considerations below). If the dispute referred is a more narrowly defined one, such as the valuation of a single component part of an interim payment, or a single head of claim, then it will not.
>
> 2. Mutual dealings on other contracts, or other defences, if they have not been taken into account by the adjudicator, will be taken into account by the court on the summary judgment application. I draw this conclusion from what Lord Briggs says at [65], where he stated 'there may be no dispute about the cross-claim, and the claim may be found to exist in a larger amount, so that there is no reason not to give summary judgment for the company for the balance in its favour.'
>
> 3. There is no 'real risk' that summary enforcement for the adjudicator's decision would deprive the paying party of security for its cross-claim."[14]

As the dispute referred in the *John Doyle* case was a final account dispute, the overall balance due under the parties' contract was the subject matter of the adjudicator's decision. Erith claimed a sum was due to it under another contract, but this claim had been considered by the adjudicator (presumably as a defence of set-off) and was taken into account in his decision; in any event even if Erith's claim under the other contract were deducted, there would still be a substantial amount on the claim sought by way of summary judgment. Therefore, points (1) and (2) were in John Doyle's favour on the facts.

Whether there was a real risk that summary judgment would deprive the paying party of its right to have recourse to that claim as security for its cross claim was the "real battleground".[15] This led Fraser J to a consideration of the *Meadowside* case, which was fully analysed in the writer's earlier article.[16] Fraser J agreed with the judge in *Meadowside* that security must seek to place the responding party in a similar position to that if the company was solvent.[17]

The judge considered the primary concern, when the court comes to consider whether there is a real risk that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim, to be recovery of the sum paid by way of satisfying the adjudicator's decision. A secondary concern is the costs that would be expended in doing so.[18]

John Doyle was offering the following security: a draft letter of credit from Henderson Jones' bankers, Lloyds, referred to in a letter of intent from Lloyds, intended to meet the primary

[14] *John Doyle Construction Ltd*, above, at [62].
[15] *John Doyle Construction Ltd*, above, at [71].
[16] Insolvency and Adjudication: Liquidation (2020) 36 Const. L.J. 503.
[17] *John Doyle Construction Ltd*, above, at [85].
[18] *John Doyle Construction Ltd*, above, at [80].

concern and an "after the event" (ATE) insurance policy, intended to meet the secondary concern.

As to the primary concern, no undertakings or any security were offered by the liquidators. For the letter of credit to be issued, Lloyds' letter of intent required the whole judgment sum to be paid to Henderson Jones (not a party to the proceedings). On the facts of this case,[19] the judge found that the proposed arrangements did not equate to a safeguard that put Erith in a similar position to the one which it would be if John Doyle were solvent. They were not comparable to undertakings from the liquidators or ring-fencing of the proceeds.

As to the ATE insurance, the judge cited *Premier Motorauctions*[20] as the leading authority, in which the Court of Appeal held that exclusions in an ATE policy can lead to a realistic prospect that the policy may be avoided or excluded. In such cases the ATE policy is not adequate security. That was the position here.

The judge accordingly concluded that there was a real risk that summary enforcement would deprive Erith of its right to have recourse to John Doyle's claim as security for its cross-claim and that meant the court would refuse summary judgment.

It was therefore not necessary to consider the application for a stay of execution. However, if that issue had arisen, a stay would have been granted, applying the usual principles,[21] as the claimant was in insolvent liquidation. On the question whether there were exceptional circumstances that would justify not awarding a stay, the same considerations as to the inadequacy of the security offered were applicable as had arisen on the question whether summary judgment should be granted.

Procedural Issue

The origin of the dispute referred to adjudication in the *John Doyle* case was in works performed between 2010 and 2012, the liquidation occurred in 2013, the adjudication was in 2018, the case was decided in 2020 and the bulk of the proceeds would not have gone to the liquidators. Fraser J observed that the expedited procedure in the Technology and Construction Court for enforcement of adjudicators' decisions was not appropriate for such a case; in such a case, the normal timescales in the Civil Procedure Rules for summary judgment applications are appropriate. Firstly, because it is fairer to a defendant having to investigate historical events to have more time and secondly because it will preserve the fast track process for parties in urgent need of a decision from the court. It should be borne in mind that whether to apply the fast track process is decided in each case by a judge of the Technology and Construction Court, who normally gives directions based on a paper application.

Conclusions

[19] The judge's detailed reasons are set out at [96-102] of *John Doyle Construction Ltd*, above.
[20] *Premier Motorauctions v Price Waterhouse Coopers and Lloyds Bank* [2017] EWCA Civ 1872.
[21] See *Wimbledon Construction Co 2000 Ltd v Vago* [2005] EWHC 1086 (TCC); [2005] B.L.R. 374; 101 Con. L.R. 99.

An adjudicator deciding a dispute arising from a claim by a company in liquidation should proceed to a decision, deciding the claim and any cross-claim that is within the adjudicator's jurisdiction. The decision should not seek to encompass any cross-claim that is not within the adjudicator's jurisdiction, even though such cross-claim may exist. The existence of any further cross-claim that is not within the adjudicator's jurisdiction should be left to be considered by the court in the event of an enforcement application.

The considerations for the court on an application for summary judgment to enforce an adjudicator's decision in favour of a company in liquidation are:

(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;

(2) whether there are mutual dealings between the parties that are outside the construction contract under which the adjudicator has resolved the particular dispute;

(3) whether there are other defences available to the defendant that were not deployed in the adjudication;

(4) whether the liquidator is prepared to offer appropriate undertakings, such as ring-fencing the enforcement proceeds, and/or whether there is other security available; and

(5) 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."[22]

The following principles apply as to whether summary judgment will be available to a company in liquidation that seeks to enforce an adjudicator's decision in its favour.

(1) The decision would have to resolve (or take into account) all the different elements of the overall financial dispute between the parties to the construction contract. This is not the usual case but will normally be the case if the dispute is as to the final account or final payment following termination. If the dispute referred is a more narrowly defined one, such as the valuation of a single component part of an interim payment, or a single head of claim, then summary judgment will not be available.

[22] *John Doyle Construction Ltd*, above, at [54].

(2) Mutual dealings on other contracts, or other defences, if they have not been taken into account by the adjudicator, will be taken into account by the court on the summary judgment application.

(3) For summary judgment to be granted, there has to be no "real risk" that summary enforcement for the adjudicator's decision would deprive the paying party of security for its cross-claim.

As to point (3), security may be offered, which must seek to place the responding party in a similar position to that if the company was solvent.[23] Undertakings from the liquidators or ring-fencing of the proceeds may be suitable security.[24] ATE insurance may be offered to secure the responding party's costs. Exclusions in an ATE policy can lead to a realistic prospect that the policy may be avoided or excluded.[25] In such cases the ATE policy is not adequate security.[26]

The extent to which liquidators will use adjudication and apply for summary judgment to enforce adjudicators' decisions is likely to be limited. As a route to monetary recovery, it will normally be suitable only in those relatively unusual cases where the company in liquidation's claim is for a final account or a final balance following termination. As the final reckoning types of adjudication are relatively costly, the *Meadowside* and *John Doyle* cases illustrate liquidators' preference for assigning claims and not taking the costs risk, even at a cost of less than 50% recovery. Cases in which liquidators will find it attractive to offer undertakings or to ring-fence the proceeds are also likely to be uncommon. Their interest is normally in seeking a relatively rapid monetary recovery for the benefit of creditors; if this is not available it is likely they will not pursue the claim. Again the *Meadowside* and *John Doyle* cases illustrate liquidators' reluctance to provide security of the quality that the courts have now made clear is required. Adjudication will be attractive where there are no significant cross-claims, but that is also an unusual situation.

[23] *John Doyle Construction Ltd*, above, at [85].
[24] *Meadowside*, above, *Bresco*, above and *John Doyle Construction Ltd*, above.
[25] *Premier Motorauctions v Price Waterhouse Coopers and Lloyds Bank* [2017] EWCA Civ 1872.
[26] *John Doyle Construction Ltd*, above.