

Insolvency and adjudication – the next instalment:

John Doyle Construction Limited (in liquidation) v Erith Contractors Limited

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Adjudication by insolvent parties is an issue that has greatly occupied the Courts of late. Much consideration has been given to the arguable conflict between set-off under the Insolvency Rules 2016 on the one hand, and the adjudication process on the other.

Earlier this year we considered the much anticipated judgment of the Supreme Court in *Bresco Electrical Services Ltd (“Bresco”) v Michael J Lonsdale (Electrical) Ltd* [here](#), in which the Supreme Court lifted restrictions imposed in earlier TCC cases and opened the door for many more adjudications to follow in the name of insolvent construction companies. The recent case of *John Doyle Construction Limited v Erith Contractors Ltd* provides more guidance as regards the court’s approach towards enforcement of such adjudication awards.

Bresco Electrical Services Ltd v Michael J Lonsdale Electrical Ltd

In January 2019 the Court of Appeal in *Bresco* overturned the TCC’s earlier finding that the adjudicator did not have jurisdiction to determine a dispute under the Insolvency Rules 2016. In his judgment in the Court of Appeal, Coulson LJ concluded that there was no jurisdictional bar preventing an insolvent company from pursuing an adjudication. However, an adjudication in those circumstances would be an “*exercise in futility*” and it was

not therefore ‘*just or convenient*’ to allow the adjudication to proceed.

The Supreme Court allowed Bresco’s appeal, concluding that the construction regime was not incompatible with the insolvency regime and that an insolvent party could commence an adjudication. The recognised difficulties enforcing subsequent adjudicator’s awards should be an issue for resolution by the TCC at summary enforcement stage, not for the adjudicator dealing with the dispute.¹

The decision not only puts it beyond doubt that there is jurisdiction for an insolvent company to refer a dispute to an adjudication, but the Supreme Court was wholly clear in its strong endorsement of adjudication, not just as a form of temporarily binding ADR, but as ‘*a mainstream dispute resolution mechanism in its own right*’.

John Doyle Construction Ltd v Erith Contractors Ltd

The claim in *John Doyle Construction Limited (in liquidation) (“JDC”) v Erith Contractors Limited (“EC”)* concerned an adjudication for sums JDC claimed to be due on its Final Account for hard landscaping works at the Olympic Park, carried out before the 2012 Olympic Games. JDC entered creditors’ voluntary liquidation on 13 June 2013. JDC commenced an adjudication for approximately £4 million. The adjudicator awarded JDC the sum of £1.2 million approximately, including VAT and interest. JDC sought to enforce the decision.

¹ The Supreme Court recognised the approach to satisfactory security for enforcement set out in *Meadowside Building Developments Ltd (in liquidation) v 12-18 Hill Street Management*

Co Ltd [2019] - see Beale & Co article [here](#). See also *Balfour Beatty Civil Engineering Ltd v Astec Projects Ltd (in liquidation)* [2020] re security for costs.

Insolvency and adjudication – the next instalment

The judgment of the TCC was due to be handed down on the same day as the Supreme Court decision in *Bresco* but was postponed so that the court would have the benefit of the *Bresco* judgment.

Principles

In his judgment Fraser J set out 5 principles to consider when deciding whether to enforce an adjudicator's decision in favour of an insolvent company:

1. Is the dispute that is the subject of the adjudication in respect of the whole of the parties' dealings under the construction contract in question, or just one element of it?
2. Are there any issues between the parties outside the construction contract, e.g. personal injury matters?
3. Are there any other defences available not deployed in the adjudication?
4. Is the liquidator prepared to offer undertakings, such as ring-fencing enforcement proceeds and/or is there other security available?
5. Is there a risk that enforcement could deprive the paying party of security for its cross-claim?

Whilst there is some overlap between the various points, the principles are clear. First, enforcement of an adjudication award is appropriate only if the award amounts to a final determination of the account – it is not appropriate in the case of interim payments, where there are ongoing dealings between the parties, whether inside or outside of the construction contract. Secondly, enforcement should only be ordered where the liquidator can provide adequate security for the other party's costs. This could be by way of, for example, an undertaking by the liquidator, third party funding or ATE insurance.

² For successful enforcement of an adjudication award by an insolvent company see *Styles & Wood (in administration) v GE CIF Trustees* [2020]

Fraser J found in favour of EC and declined to enforce the adjudicator's decision. This was on the basis that JDC had provided inadequate security for both EC's cross-claims and the costs of bringing any such claim.

Procedure

Fraser J commented in his judgment that the TCC's streamlined procedure for the hearing of adjudication business was designed to ensure swift resolution of issues arising during ongoing construction contracts, to ensure continued cash flow and progress on site. It was not designed for cases such as this, where the work in question was carried out from 2010-2012 and where any proceeds would be paid to the liquidator. Parties to historic disputes should be allowed time to investigate the claim, gather evidence etc, which is likely to take longer than when work is contemporaneously continuing on site.

Comment

Unfortunately, the impact of Covid 19 means that [the](#) construction industry is likely to see a slew of insolvencies in forthcoming months. Adjudication is a quick and cheap means of dispute resolution and is therefore likely to be well used. Insolvent companies should be aware, however, that whilst there is now no obstacle to prevent adjudication of a dispute, enforcement will be possible only in limited circumstances. The adjudicator's award must represent a final account of the dealings between the parties and, also, the insolvent party must be able to provide adequate security for costs². In many cases, insolvent companies will find these requirements prohibitive.

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