



BEALE&CO

CONSTRUCTION

A Practical Guide to Adjudication and Case Law Update

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Introductions



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Agenda

1. The adjudication process:
 - a) Original aims
 - b) Developments
 - c) Typical timetable
2. Steps to consider when bringing an adjudication for the main types of claims: defects, valuation and delay
 - a) Valuation disputes
 - b) Defects
 - c) Delay
3. Steps to consider when defending an adjudication including jurisdiction.
4. Recent case law and where this fits in to adjudication process.

What is adjudication and what were the original aims?

- + Adjudication:
 - Dispute resolution process for construction contracts
 - Aims to give a quick decision which is binding on the parties unless and until challenged in court or arbitration or subject to an agreement between the parties
- + Original intention – resolve money dispute to benefit cash flow
- + Speed and low cost were considered key
- + Parties could not contract out of the process – backed up by the Construction Act 1996
- + Construction Act 1996 – adjudication is for ‘a’ dispute, not multiple disputes.
- + Adjudicate at any time
- + No restriction on types of cases

Expanded use of Adjudication

- + In the last 25 years adjudication used on all types of construction disputes:
 - Defects
 - Professional negligence
 - Termination
 - Contractual declarations
 - Extensions of time / responsibility for delays
 - Final accounts

- + Type of dispute impacts on timetable and preparation needed



Typical timetable

1. Notice of Adjudication – Day -7 – Referring Party
 2. Appoint Adjudicator – Day -7 to -1 – Referring Party
 3. Referral – Day 0 – Referring Party
 4. Response – Day 7 to 14 – Responding Party
 5. Reply – 3 to 7 days after Response – Referring Party
 6. DECISION – Day 28 – Adjudicator
- + Timetable can be extended
 - + Conduct of adjudication at Adjudicator's discretion – can order further submissions; convene a meeting; raise specific queries

Bringing an Adjudication – practical tips

- + Smash and grab adjudications
- + The common types of dispute:
 1. Valuation of work
 2. Defects
 3. Delay
- + Threshold matters:
 - Qualifying construction contract or adjudication clause
 - Crystallised dispute



Bringing an Adjudication – Valuation disputes

- + Valuation disputes concern the true value of work and will often comprise numerous sub-claims
- + Examples:
 - Extent of work completed at the valuation date
 - Variations and their value
 - Loss and expense and LADs
 - Sums withheld for defects
- + Consider dealing with individual disputed items
- + Set out legal and factual basis of claims on item-by-item basis
- + Burden on the Referring Party

Valuation dispute - Extent of work done at valuation date

- + Evidence to support application for extent of work done
- + Consultants' appointments – staged payments vs hourly rate services
- + Evidence to support:
 - Photos
 - Statement from person who prepared the application
 - Evidence to undermine the paying party's assessment
 - Documents e.g. materials delivered to site; site meetings on progress; area sign offs



Variation dispute – is it a variation and value

- + Legal and factual angle
- + Contract key:
 - Entitlement to a variation
 - Steps to obtain entitlement including any condition precedent
 - Evidence issue is a variation and not part of original works or fixing a defect
- + Factual evidence to support – partly based on Responding Party's reason for rejection
- + Value can be complex – issues include:
 - Identifying applicable rates
 - Measurement of work
 - Impact of original contract works to be taken into account – 'omits'

Defects dispute

- + Not original purpose of adjudication
- + Type of decision sought:
 - life of project = declaration plus action
 - After project = action or value of works already carried out
- + Factual evidence key
 - Identify nature of defects
 - Clear link to Responding Party's work/services
 - Nature of remedial works needed



Defects dispute – jurisdictional issues with 3rd party reports

- + Any third party report to support provided to Responding Party in advance
- + If seen for first time in adjudication = RISK:
 - Jurisdictional challenge that dispute not crystallised
 - Breach of right to natural justice if taken into account OR timetable not adjusted to give Responding Party sufficient time to consider



Defects dispute – the remedies sought

- + In addition to factual matters – need clear statement addressing steps taken to notify defects under the contract and that Responding Party allowed opportunity to investigate/rectify

- + Clear avenue for next steps:
 - Responding Party to rectify? Is there a contractual requirement that Responding Party must rectify?
 - Claim for cost of remedial works done or to be done by others?
 - Leave rectification for later discussion

Professional Negligence Adjudications

- + Appropriate forum?
- + Expert report required – *Pantelli*
- + Crystallise dispute – provide expert report in advance and give time to consider
- + Impact on time and costs

Bringing an Adjudication - delay

- + Broadly same considerations as for defects claims
- + Need for clear analysis of delay and / or loss and expense claimed – can be supported by independent expert evidence
- + EOT / delay claims:
 - Contractual entitlement to an EOT
 - Evidence of notices etc. given during project
 - Critical path analysis needed?
 - Factual evidence to support analysis

Bringing an Adjudication – concluding points

- + The 'ask' in the Notice is key
- + Give Adjudicator power to make an assessment that something is due i.e. not all or nothing
- + Timing important – make sure the Referral is complete before the Notice is served
- + Referral to mirror the redress sought in the Notice with evidence to support
- + Supporting evidence and submissions should be easy to navigate

Responding Party – steps to take at start

- + Be proactive so can hit the ground running
- + More done in advance the better – limited time once the Referral is served to prepare a Response
- + Adjudications are disruptive – needs careful management
- + Identify key staff members with knowledge of the issues – ask them to pull together notes and recollections
- + Contact relevant 3rd parties
- + Collate documents and review
- + Instruct assistance – lawyers; experts – and get any necessary advice
- + Options for dealing

Dealing with the Notice

- + Check proper service – including application to appoint Adjudicator made after Notice served
- + Consider jurisdiction – raise any issues ASAP
- + Jurisdiction of Adjudicator – set by Notice
- + Adjudicator must conduct the Adjudication under the statutory / contractual timetable
- + Too tight a timetable – breach of right to natural justice?

Jurisdiction (1)

- + Two types of jurisdiction – internal and threshold
- + Internal:
 - Rare
 - Failure to apply contractual or statutory payment provisions properly
- + Threshold:
 - Relates to whether a jurisdiction should proceed
 - If Adjudicator agrees they should resign
 - If Adjudicator reject – maintain challenge to raise at enforcement

Jurisdiction (2)

- + Examples of threshold challenges
- + (1) General jurisdiction:
 - No concluded contract or not a construction contract
 - Parties to adjudication not the parties to the contract
 - Not a construction contract
- + (2) Particular jurisdiction:
 - No dispute crystallised
 - Dispute referred not the same as the dispute crystallised
 - Dispute decided in previous adjudication or same or substantially the same as already decided
- + 3) Jurisdiction regarding determination:
 - Issues with the decision
 - Adjudicator decide matters not referred

Jurisdiction (3)

- + Steps to take if have a jurisdictional challenge:
 - RAISE IT! Challenge as soon as issue arises
 - MAINTAIN IT! Keep the challenge maintained, even after the Adjudicator makes their determination.
- + Identification of challenge – General or Specific
- + Once raised – Adjudicator considers:
 - If agrees with challenge – Adjudicator resigns
 - If does not agree – adjudication continues
- + Jurisdictional challenge must be maintained in all correspondence and submissions in order to be able to raise it on enforcement
- + Other options – Court challenge or refuse to participate

The Response

- + Review Referral – any new evidence?
- + Consider timetable and make necessary submissions
- + Put together Response:
 - All relevant matters
 - Supporting factual evidence – witness statement(s) and documents
 - Expert evidence
 - Easy to navigate



Remainder of adjudication

- + Reply plus any further submissions allowed by Adjudicator – not endless submissions
- + Adjudicator can raise queries – answer to best you are able
- + Adjudicator can call a meeting
- + Decision issued – review for any potential challenges although threshold for successful challenges high and does not extend to errors in fact or law
- + Comply with award and fees determination unless grounds to resist enforcement

Enforcement (in brief!)

- + Decisions will be enforced unless clear and obvious jurisdictional issue
- + The procedure adopted by the TCC follows the original ethos of adjudication – reach a quick decision.
- + The TCC Guide sets out the steps to follow for an enforcement claim. The condensed timetable aims to have a hearing 28 days after directions are issued; typically done between 2 and 5 days after the claim is issued.
- + The costs of enforcement are recoverable but these cannot include the costs of adjudication.

Recent cases of note

- + There has been a number of reported cases on adjudication in past year. The three cases to discuss today are:
 1. The Supreme Court's decision in ***Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25*** in June 2020 concerning referrals by companies in liquidation
 2. ***John Doyle Construction Limited (in liquidation) v Erith Contractors Limited [2020] EWHC 2451 (TCC)*** in July 2020 dealing with when an insolvent referring party can enforce a decision
 3. ***JRT Developments Ltd v TW Dixon (Developments) Ltd*** in October 2020 dealing with circumstances where a court is willing to stay enforcement of a smash and grab decision due to concern about the “*manifest injustice*” of enforcement

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

(1) The Supreme Court decision in *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd*

- + The Supreme Court decided the right of a company in liquidation to refer claims to adjudication – a vexed issue
- + The long established position had been parties could not refer a claim against a company in liquidation, nor could an insolvent company adjudicate a claim against a respondent with a cross-claim
- + Previous decisions of Fraser J in 2018 and Coulson LJ in 2019 had limited the ability of insolvency practitioners to commence adjudications

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

Background:

- + Bresco and Lonsdale electrical contractors
- + In 2014 Bresco carried out installation work for Lonsdale at 6 St James's Square, London SW1



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

- + In 2016 Bresco entered insolvent liquidation
- + Both parties claimed they were owed money by the other
- + Lonsdale said Bresco had abandoned the project prematurely, forcing them to pay £325,000 for replacement contractors
- + Bresco said Lonsdale had not paid for work and owed £219,000 in unpaid fees plus damages for lost profits
- + In 2018, Bresco's liquidators took steps to refer their £219,000 claim to an adjudicator backed by Pythagoras Capital

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

- + Lonsdale objected to the adjudication on the basis of the old law:
 - (1) Bresco's claim and Lonsdale's cross-claim had cancelled each other out by insolvency set-off so there was no longer a claim, or dispute *under the contract* (**the jurisdiction issue**).
 - (2) the adjudicator's temporarily binding decision would not be enforced by the court so the court should stop the adjudication because it was pointless (**the futility issue**).

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

How was the case decided?

- + In the TCC, Fraser J accepted both Lonsdale's arguments and even granted Lonsdale an injunction to stop the adjudication going ahead
- + Following Bresco's appeal, the Court of Appeal rejected the jurisdiction point but upheld the injunction on the basis of the **futility issue** agreeing there was an incompatibility between the adjudication and the insolvency regimes and highlighting issues with enforcement
- + Bresco appealed again to the Supreme Court. Lonsdale cross appealed on the jurisdiction issue.

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

The Supreme Court:

- + Unanimously allowed Bresco's appeal and dismissed Lonsdale's cross-appeal. Lord Briggs gave the leading judgement
- + On the **jurisdiction issue**:
 - decided that insolvency set-off between Bresco's claim and Lonsdale's cross-claim did not mean that there is no longer a dispute under the construction contract



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

+ On the **futility issue**:

- Decided that Bresco had a statutory and contractual right to adjudicate and it would be inappropriate for the court to interfere
- Adjudication was a simple, proportionate method for liquidators to determine assess proofs –is this really how adjudication is likely to be used?
- Problems can be appropriately dealt with at the enforcement stage – difficult decisions for responding parties when receiving a significant claim backed by 3rd party funding

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

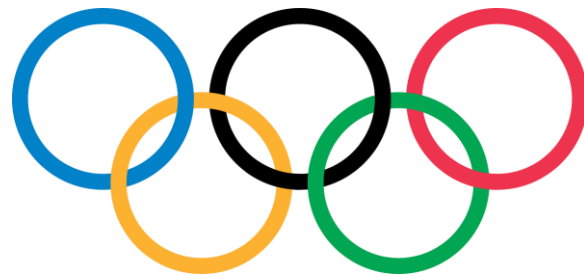
+ **What does the judgment mean for liquidators and parties to construction contracts?**

- Responding parties can no longer seek to injunct referrals by insolvent companies and adjudicators decisions will be valid – concern for employers and main contractors who could now face large historic claims
- The key battle ground will be challenges to enforcement of decisions
- Created a market for final account disputes?
- The Supreme Court endorsed the approach to security for costs as a condition of summary judgment 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 will need to be prepared to ring-fence the proceeds of enforcement, and to provide security – unlikely in the majority of insolvencies

(2) John Doyle Construction Ltd (in liquidation) v Erith Contractors Limited [2020] EWHC 2451 (TCC)

Case concerned a summary judgment application brought by insolvent company to enforce an adjudicator's decision in its favour

- + Dispute related to hard landscaping work that it had carried out on the London Olympic Park way back in 2012. JDC had entered into liquidation on 21 June 2012
- + An agreement was reached with funders in 2016 and an adjudication was commenced in 2018.
- + JDC was awarded £1.2 million.



(2) John Doyle Construction Ltd (in liquidation) v Erith Contractors Limited [2020] EWHC 2451 (TCC)

- + Fraser J found for Erith and refused enforcement of the decision
- + Decided that JDC had provided inadequate security for Erith's cross-claims, as well as inadequate security for Erith's costs of bringing such a claim
- + Fraser J identified **five principles** of enforcement of decisions in favour of insolvent companies:
 - (1) Has the adjudicator considered the entire financial dealings between the parties under the construction contract, e.g. a final account? No “smash & grab”...
 - (2) Were there any dealings outside the construction contract between the parties?
 - (3) Are there any defences that were not deployed in the adjudication?
 - (4) Is the liquidator prepared to offer the necessary undertakings such as ring-fencing of the disputed sum under the decision?
 - (5) Is there a risk that enforcing the decision will deprive the losing party of security for its cross-claim?

(2) John Doyle Construction Ltd (in liquidation) v Erith Contractors Limited [2020] EWHC 2451 (TCC)

Summary –

- + The court will not enforce decisions in favour of companies in liquidation unless:
 - the adjudication deals with all the outstanding matters between the parties and
 - the insolvent party can offer security to so the payer can recover sums under the decision and costs for seeking a final determination via litigation or arbitration.
- + Bresco may allow an insolvent company to bring an adjudication, but the adjudicator's decision will not be enforced by the court unless it can satisfy the court that the paying party will not be left out of pocket if the decision is later reversed.

(3) *JRT Developments Ltd v TW Dixon (Developments) Ltd*

(3) **JRT Developments Ltd v TW Dixon (Developments) Ltd:**

- + An unusual case reported in October 2020 from the TCC list in Birmingham where a responding party successfully obtained a stay of execution of the enforcement of a “*smash and grab*” decision. Unusual for a court to refuse enforcement but the case turned on unusual facts.
- + Usually, a stay of execution will only be ordered in very limited circumstances, e.g. under *Wimbledon v Vago* principles, where the court is persuaded that a claimant would be unable to repay if a decision is reversed by the court
- + In this case, allowed a stay of execution of the enforcement due to enforcement leading to “*manifest injustice*” rather than the impecuniosity of the claimant

(3) JRT Developments Ltd v TW Dixon (Developments) Ltd

- + The success of the “manifest injustice” argument arose from the “exceptional” facts of the case:
 - the parties' directors and shareholders were family members who dealt with each other informally
 - the claimant had managed the project, raised the funding and obtained payment in full for previous valuations from the Homes and Communities Agency
 - the parties had not operated the JCT Minor Works contract's payment provisions
 - the adjudicator's decision followed a "smash and grab" based on the first payment notice either party had served after the contract had been terminated
 - the defendant did not know it needed to serve a pay less notice in response
 - the defendant could not pay the judgment sum of £953,000 plus VAT and would be forced into liquidation if ordered to do so

Questions



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