

# Adjudication enforcement by companies in liquidation: Court of Appeal raises fundamental objections

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*A recent Court of Appeal decision has criticised obiter comments made by the Supreme Court in *Bresco v Lonsdale* to the effect that adjudication decisions in favour of companies in liquidation could in certain circumstances, and with appropriate safeguards, be enforced by way of summary judgment. The Court of Appeal has indicated that such an approach would be at odds with the mandatory right of set-off arising under the Insolvency Rules. The Court of Appeal's comments in this respect are themselves obiter and will give rise to uncertainty in this area of the law.*

## Bresco v Lonsdale: a recap

Under the Insolvency (England and Wales) Rules 2016 (the **Insolvency Rules**), a mandatory set-off takes effect upon a company's entry into liquidation. The set-off applies where there have been mutual dealings between the company and a creditor. The effect of the rule is to net-off those dealings so that only the balance is provable in the liquidation.

The rule is an exception to the *pari passu* principle (i.e. equal treatment) as the set-off provides the creditor with a full recovery of part of its claim. Without the rule, the creditor would be obliged to make full payment of any amounts owed to the company, whilst only being able to prove in the liquidation for its own claims. If the dividend from the liquidation is small, the creditor could

well be required to pay more into the liquidation than it would receive in return despite the fact that its claims against the company exceed the company's claims against it. Insolvency set-off takes place automatically upon liquidation and overrides all other set-offs or contract terms to the contrary. Parties cannot contract out of insolvency set-off or waive its operation.

The interaction between the Insolvency Rules and construction adjudication was considered recently by the Technology and Construction Court, the Court of Appeal and the Supreme Court in *Bresco v Lonsdale* (see our Law-News on these decisions [here](#), [here](#) and [here](#)). In summary, the TCC initially held that mandatory set-off under the Insolvency Rules deprived an adjudicator of jurisdiction to determine disputes under a construction contract involving the company in liquidation. That was because the rights under the construction contract were said to be replaced by the set-off mechanism under the Insolvency Rules.

The Court of Appeal overruled this finding, considering that adjudications could still be validly commenced by companies in liquidation, but held there to be a basic incompatibility between adjudication and the Insolvency Rules. This was reflected in previous cases which had held that the court will not, save in exceptional circumstances, enforce adjudication decisions in favour of companies in liquidation where the responding party has a cross-claim. To do so would force the responding party to pay the amount of the adjudication decision, while being left to prove in the liquidation for its cross-claim and receive only a partial recovery together with other unsecured creditors. In such circumstances the responding party would be deprived of the benefit it was intended to have through the set-off under the Insolvency Rules. Accordingly, the Court of Appeal found that, save for exceptional circumstances, an adjudication by a company in liquidation would be liable to be stopped by the court as an exercise in futility where the other party has a cross-claim (i.e. because any adjudication decision would not be enforceable).

The Supreme Court subsequently reversed the Court of Appeal's decision, finding that difficulties in enforcing an adjudication decision should not prevent a company in liquidation from pursuing adjudication as a dispute resolution procedure in its own right. As the Court noted, "*adjudication has, as was always intended, become a mainstream method of ADR, leading to the speedy, cost effective and final resolution of most of the many disputes that are referred to adjudication. Dispute resolution is therefore*



*an end in its own right, even where summary enforcement may be inappropriate or for some reason unavailable."*

The Supreme Court also gave *obiter* guidance as to the approach to be taken to the enforcement of adjudication decisions in such circumstances. The Court noted it will "*not be in every case that summary enforcement will be inappropriate*". In particular, if the adjudicator has been able to decide on all claims and cross-claims between the parties such that a determination can be given of the net balance, there was "*no reason arising merely from the existence of cross-claims why it should not be summarily enforced*". Any concerns as to the fairness of such an approach could be dealt with at the enforcement stage through appropriate security arrangements, such as an undertaking from the liquidator to ring-fence the enforcement proceeds. In this regard, the Supreme Court appeared to approve of a TCC decision reached after the Court of Appeal's decision (*Meadowside v Hill Street Management*) where enforcement was, in principle, allowed subject to the giving of security for the amount of the decision to be enforced and also for the other party's costs (see our Law-Now on this decision [here](#)).

A recent Court of Appeal decision now appears to depart from the Supreme Court's *obiter* comments as to enforcement and has thrown doubt on whether adjudication decisions in favour of companies in liquidation can be enforced even with appropriate security arrangements.

## John Doyle Construction Limited (In Liquidation) v Erith Contractors Limited

BAM Nuttall Ltd was engaged by the Olympic Development Authority to carry out, amongst other things, certain construction works at the Olympic Park. BAM required a trade contractor to perform hard landscaping works and Erith Contractors Limited (**Erith**) was pre-qualified to tender, which it did but in agreement with John Doyle Construction Limited (**JDC**) that the works would be substantially performed by JDC. The contract between Erith and JDC was an NEC3 form and was entered into in July 2010.

JDC entered into administration in June 2012 just before completion of the works and subsequently entered a creditors voluntary



liquidation in June 2013. Erith was obliged to complete the sub-contract works itself under its contract with BAM.

A dispute arose as to JDC's final account. The liquidator assigned JDC's claim to Henderson & Jones (**HJ**), litigation funders, for an immediate payment of £6,500, giving HJ the right to pursue the claim on JDC's behalf and retain 55% of the net recovery.

HJ commenced an adjudication (on JDC's behalf) in January 2018, claiming from Erith approximately £4 million, which was claimed to be due on JDC's final account. The adjudicator awarded JDC approximately £1.2 million, including VAT and interest, and HJ/JDC then claimed for enforcement of the adjudicator's decision by way of summary judgment. Erith opposed enforcement on a number of grounds.

The TCC at first instance followed the approach adopted in *Meadowside* and supported by the Supreme Court's *obiter* comments in *Bresco*. Summarising this position, the court set out three requirements for the enforcement of an adjudication decision in favour of a company in liquidation:

- The decision would need to have resolved (or haven taken into account) all of the various elements of the overall financial dispute between the parties to the construction contract;
- Mutual dealings on other contracts, or other defences, if they had not been taken into account by the adjudicator, would need to be taken into account by the court on the summary judgment application; and
- There would be no "real risk" that summary enforcement of the adjudicator's decision would deprive the paying party of security for any cross-claim.

Here, as the dispute related to the valuation of JDC's final account, summary judgment was potentially available, however, if the dispute had been more narrowly defined, such as the valuation of a single component part of an interim payment, or one single head of claim, then it would not. In the event, however, the court held that the security offered by JDC was inadequate and refused enforcement. There was, for example, no undertaking from the liquidators to ring fence the proceeds of the adjudication decision. Accordingly, there was no assurance that JDC would be able to repay the sum awarded by the adjudicator if the decision was later reversed, as well as to cover any adverse costs order.

## The Court of Appeal

HJ/JDC appealed the TCC's decision as to the adequacy of the security offered. The Court of Appeal rejected the appeal on this point, for similar reasons to the TCC, but went on to make *obiter* comments as to the circumstances in which it would be appropriate to grant enforcement of an adjudication decision in favour of a company in liquidation. In doing so, the Court of Appeal appears to have expressed its disagreement with the *obiter* comments made by the Supreme Court in *Bresco*.

In the Court of Appeal's view, even where an adjudicator has dealt with all claims and cross-claims and appropriate security has been offered, it would not usually be appropriate to grant summary judgment. This is because it would still prejudice the ability of the creditor to challenge the adjudication decision and take advantage of the security granted by Insolvency Set-Off. The Court noted that an adjudicator's decision is provisionally binding in nature and does not finally determine the "net balance" between the parties even if the adjudicator has considered all relevant claims and crossclaims. The Court therefore highlighted the same incompatibility between the Insolvency Rules and statutory adjudication which it had relied on in *Bresco*, but instead of preventing adjudication altogether this was now said to preclude the enforcement of an adjudication, save where the adjudication decision is not or cannot be challenged, and/or any cross-claims can be disposed of by summary judgment in the usual way.

The Court disagreed with HJ/JDC that the interests of enforcing adjudication decisions and safeguarding Erith's entitlement to Insolvency Set-Off could be balanced through the approach taken in *Meadowside*:

*"It is not a question of security; it is a question of the insolvent company's cause of action being for the net balance only. It is not a matter of discretion because it is impossible to waive or disapply the Insolvency Rules. As my lord, Lord Justice Lewison put it during argument, insolvency set-off must apply to adjudication; it is not somehow an exception. To find otherwise would give rise to incoherence."*



## Conclusion and implications

This decision would appear to leave the law in this area in a state of uncertainty. The approach taken by the TCC in the *Meadowside* case appeared to be supported by the Supreme Court's *obiter* comments in *Bresco*. These comments have now been criticised by the Court of Appeal in yet still further *obiter* comments. Scope for argument is likely to remain until the point is finally determined by the Supreme Court.

If the Court of Appeal's comments as to enforcement are to be applied going forward, they may well mark the end of attempts to enforce adjudication decisions in favour of companies in liquidation. The Court's judgment makes clear that such decisions will only be enforced in rare circumstances, such as where the decision has become finally binding due to a failure to serve a Notice of Dissatisfaction. The Court's comments may therefore also mark a decline in the market for assignment of construction claims from insolvent companies to litigation funders, such as occurred in this case to HJ.

## References:

*Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd* [2018] EWHC 2043 (TCC)

*Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2019] EWCA Civ 27

*Meadowside Building Developments Ltd v 12-18 Hill Street Management Company Ltd* [2019] EWHC 2651 (TCC)

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

*John Doyle Construction Limited (In Liquidation) v Erith Contractors Limited* [2021] EWCA Civ 1452

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