

**Adjudication After Bresco:
Bresco Electrical Services Ltd (in liquidation)
v Michael J Lonsdale (Electrical) Ltd [2020]
UKSC 25**

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Overview



- On 17 June 2020, the Supreme Court handed down its judgment in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd*
- Focused on the interaction between adjudication and the insolvency regime – are they inherently incompatible?

Insolvency fact of life in the construction industry...



June 2020



>	09774808	A. KING & COMPANY NE LTD	01 June 2020	Appointment of Liquidator	Other building completion and finishing
>	09774808	A. KING & COMPANY NE LTD	03 June 2020	In Liquidation	Other building completion and finishing
>	11359020	ABBEY CONSTRUCTION (NORTHWEST) LTD	29 June 2020	Appointment of Liquidator	Development of building projects
>	SC506689	ABERDEEN CITY ELECTRICAL LTD	29 June 2020	Appointment of Liquidator	Electrical installation
>	10066817	AFFINITY CONTRACTS LTD	12 June 2020	Administration Order	Other specialised construction activities n.e.c.
>	10066817	AFFINITY CONTRACTS LTD	23 June 2020	In Administration	Other specialised construction activities n.e.c.
>	05700043	AINSCAN LTD	02 June 2020	Administrative Receiver Appointed	Development of building projects
>	02762447	ALBANY BRENT LTD	05 June 2020	In Administration	Construction of commercial buildings
>	SC071876	ALEXANDER GATEY & CO LTD	17 June 2020	Appointment of Liquidator	Other building completion and finishing
>	SC071876	ALEXANDER GATEY & CO LTD	20 June 2020	In Liquidation	Other building completion and finishing
>	SC644944	ALPHA STEP LTD	18 June 2020	Meeting of Creditors	Other construction installation
>	SC644944	ALPHA STEP LTD	29 June 2020	Appointment of Liquidator	Other construction installation
>	06891712	AMARELLE LTD	18 June 2020	Appointment of Liquidator	Other specialised construction activities n.e.c.
>	06891712	AMARELLE LTD	27 June 2020	In Liquidation	Other specialised construction activities n.e.c.
>	03920938	AMCE CONSTRUCTION LTD	03 June 2020	Appointment of Liquidator	Development of building projects
>	03920938	AMCE CONSTRUCTION LTD	11 June 2020	In Liquidation	Development of building projects
>	06445710	APEX SHELTER SYSTEMS LTD	10 June 2020	Appointment of Liquidator	Other construction installation
>	06445710	APEX SHELTER SYSTEMS LTD	13 June 2020	In Liquidation	Other construction installation
>	10343105	ARJ BRICKWORK LTD	30 June 2020	Appointment of Liquidator	Construction of domestic buildings
>	08843959	ATAL CONTRACTING LTD	30 June 2020	Administration Order	Other specialised construction activities n.e.c.
>	07352237	ATHENA CIVIL ENGINEERING LTD	09 June 2020	Administration Order	Construction of other civil engineering projects n.e.c.
>	07352237	ATHENA CIVIL ENGINEERING LTD	16 June 2020	In Administration	Construction of other civil engineering projects n.e.c.
>	08474544	ATTOLLO ELEVATOR LTD	30 June 2020	Appointment of Liquidator	Other specialised construction activities n.e.c.
>	Etc...				

The Insolvency Regime



- A liquidator has the power to “bring or defend any action or other legal proceeding in the name and on behalf of the company” (Insolvency Act 1986, Sch. 4, Pt. II, Para. 4)
- Rule 14.25(2) of the Insolvency Rules 2016 –
“(2) An account must be taken of what is due from the company and the creditor to each other in respect of their mutual dealings and **the sums due from the one must be set off against the sums due from the other.**”

The Adjudication Regime

- S108(1) of the HGCRA 1996: “A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.”
- Ss (1)-(4) sets out contractual requirements in relation to adjudication procedure
- S108(5): where the ss(1)-(4) requirements are not complied with, the adjudication regime in the Scheme for Construction Contracts applies

Enforcement of Adjudication Decisions



- General approach –
“The courts have taken a robust and purposive attitude to enforcement of adjudicator’s decisions, and will generally enforce any decision made by an adjudicator with jurisdiction to make that decision.”

(Keating on Construction Contracts 10th Edn., para. 18-56)

- This is recognised by the Supreme Court at para. 26 of Bresco

Enforcement where companies in liquidation



Bouygues UK Ltd v Dahl-Jensen UK Ltd [2001] 1 All E.R. (Comm) 1041:

- Appellant appealed against a decision to grant summary judgment to enforce an adjudicator's decision in favour of the Respondent
- “...there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in the liquidation, in which full account can be taken and a balance struck.” [35]
- However, this point was not raised in the high court or an appeal and therefore the order of the judge was not set aside
- BUT stay of execution granted (without much explanation)

Stay of execution: Wimbledon v Vago [2005] BLR 374



- a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
- b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
- c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see *AWG Construction Services v Rockingham Motor Speedway* [2004] EWHC 888).
- d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see *Herschell Engineering Ltd v Breen Property Ltd* (unreported) 28 July 2000

Stay of execution: Wimbledon v Vago principles (e) and (f)



- e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522 (CA) and *Rainford House Ltd v Cadogan Ltd* (unreported) 13 February 2001).
- f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:
 - (i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see *Herschell*); or
 - (ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see *Absolute Rentals v Glencor Enterprises Ltd* (unreported) 16 January 2000 , TCC)."

New principle (g): Gosvenor London Ltd v Aygün Aluminium [2019] Bus. L.R. 628



- “(g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay.”

Subsequent cases on enforcement

- Liquidation
 - **Gosvenor London Ltd v Aygun Aluminium UK Ltd [2019] Bus. L.R. 628 and [2019] EWHC 3619 (TCC)**
- Administration
 - **Straw Realisations (No.1) Ltd v Shaftsbury House (Developments) Ltd [2010] EWHC 2597 (TCC)**
- CVA
 - **Westshield Ltd v Whitehouse [2013] EWHC 3576 (TCC)**
 - **Indigo Projects London Ltd v Razin [2019] EWHC 1205 (TCC)**

Bresco in the Court of Appeal



- Two conjoined appeals on insolvency and construction law
- Bresco - a company in insolvent liquidation - sought to set aside an injunction preventing the continuation of an adjudication in which it sought payment for work done
- Cannon Corporate appealed against a summary judgment in favour of Primus and against the refusal to grant a stay of execution in spite of the fact that Primus was in a CVA

Bresco appeal - Facts

- Bresco provided electrical installation works for Lonsdale
- 6 months later it entered insolvent liquidation
- Bresco referred to adjudication a claim for repudiation of the subcontract
- Lonsdale obtained an injunction on the grounds that:
 - (i) the adjudicator did not have jurisdiction; and
 - (ii) it was inconceivable that such a decision could be enforced.

Primus appeal - Facts

- Primus was contracted by Cannon to design and build a hotel
- Primus served a notice of £220,000 and Cannon responded with a pay less notice of nil and terminated the contract.
- In an adjudication, Primus claimed damages for breach of contract and was awarded over £2 million.
- Primus brought enforcement proceedings and entered the CVA on the basis that it would be able to make significant recovery from third parties sufficient to satisfy all its creditors
- **This appeal settled, but given the close links between the two appeals and the important issue of waiver, the court determined both.**

Decision in Bresco – Court of Appeal



Jurisdiction

- No reason to treat a reference to adjudication differently to a reference to arbitration
- Just because a company has entered liquidation does not mean that the underlying claim ceases to exist

Utility

- “There is a basic incompatibility between adjudication and the regime set out in the Rules. The former is a method of obtaining an improved cashflow quickly and cheaply. The latter is an abstract accounting exercise, principally designed to assist the liquidators in recovering assets in order to pay a dividend to creditors.”
(Coulson LJ, para 37)
- Awarding summary judgment would be futile as the award could not be enforced
- Therefore injunction upheld to restrain adjudication.

Decision in Primus – Court of Appeal



Jurisdiction

- Jurisdictional arguments were dismissed for the same reasons as those given in Bresco
- However, these arguments were not open to Cannon Corporate as they had only raised the jurisdiction argument for the first time on appeal
- See Coulson LJ's findings on waiver

Summary judgment

- Judge below was correct to distinguish the decision in Westfield
- He had been entitled to enter summary judgment in favour of Primus

Stay of Execution

- A court was permitted to exercise its discretion to stay if it concluded that the party seeking the stay was 'substantially responsible' for the claimant's financial difficulties.
- Cannon were plainly the principal cause of Primus' financial difficulties and the judge had been right to refuse their application for a stay

Decision in Primus – Court of Appeal continued



Waiver

“[T]he purpose of the 1996 Act would be substantially defeated if a responding party could, as a matter of course, reserve its position on jurisdiction in general terms at the start of an adjudication, thereby avoiding any ruling by the adjudicator or the taking of any remedial steps by the referring party; participate fully in the nuts and bolts of the adjudication, either without raising any detailed jurisdiction points, or raising only specific points which were subsequently rejected by the adjudicator (and the court); and then, having lost the adjudication, was allowed to comb through the documents in the hope that a new jurisdiction point might turn up at the summary judgment stage, in order to defeat the enforcement of the adjudicator's decision at the eleventh hour.”

(Coulson LJ, Para. 91)

Waiver principles

- i) If the responding party wishes to challenge the jurisdiction of the adjudicator then it must do so "appropriately and clearly". If it does not reserve its position effectively and participates in the adjudication, it will be taken to have waived any jurisdictional objection and will be unable to avoid enforcement on jurisdictional grounds (Allied P&L).
- ii) It will always be better for a party to reserve its position based on a specific objection or objections: otherwise the adjudicator cannot investigate the point and, if appropriate, decide not to proceed, and the referring party cannot decide for itself whether the objection has merit (GPS Marine).
- iii) If the specific jurisdictional objections are rejected by the adjudicator (and the court, if the objections are renewed on enforcement), then the objector will be subsequently precluded from raising other jurisdictional grounds which might otherwise have been available to it (GPS Marine).
- iv) A general reservation of position on jurisdiction is undesirable but may be effective (GPS Marine ; Aedifice). Much will turn on the wording of the reservation in each case. However, a general reservation may not be effective if:
 - i) At the time it was provided, the objector knew or should have known of specific grounds for a jurisdictional objection but failed to articulate them (Aedifice , CN Associates);
 - ii) The court concludes that the general reservation was worded in that way simply to try and ensure that all options (including ones not yet even thought of) could be kept open (Equitix).

Bresco in the Supreme Court



- The Supreme Court allowed the appeal against the decision of the Court of Appeal
- The judgment focused on three issues:
 - Jurisdiction
 - Utility
 - Enforcement

Supreme Court - Jurisdiction



- SC rejected the jurisdiction ground
- “[T]he existence of a cross-claim operating by way of insolvency set-off does not mean that the underlying disputes about the company’s claim under the construction contract and (if disputed) the cross-claim simply melt away so as to render them incapable of adjudication. The submission that they are replaced by a dispute in the insolvency is wrong for the reasons which follow.” [47]

Supreme Court - Utility



- SC disagreed with the CoA on the issue of utility
- CoA had focused too heavily on the ability of a liquidator to enforce an adjudication decision
- It failed to appreciate the broader dispute resolution role fulfilled by adjudication
- The right to adjudicate mandated by the HGCRA 1996 was a valuable tool available for the administration of an insolvency process

Reasoning on utility

- 59. The starting point, once it is appreciated that there is jurisdiction under [section 108](#) in such circumstances, is that the insolvent company has both a statutory and a contractual right to pursue adjudication as a means of achieving resolution of any dispute arising under a construction contract to which it is a party, even though that dispute relates to a claim which is affected by insolvency set-off. It follows that it would ordinarily be entirely inappropriate for the court to interfere with the exercise of that statutory and contractual right. Injunctive relief may restrain a threatened breach of contract but not, save very exceptionally, an attempt to enforce a contractual right, still less a statutory right.
- 60. That very steep hurdle is not surmounted, either generally (in the context of insolvency set-off) or on the particular facts of this case. For reasons already explained it is simply wrong to suggest that the only purpose of construction adjudication is to enable a party to obtain summary enforcement of a right to interim payment for the protection of its cash flow, although that is one important purpose. In the context of construction disputes 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.
- 61. Nor is there any basis for a conclusion that this beneficial means of dispute resolution is incompatible with the insolvency process, or with the requirement to deal with cross-claims in insolvency by set-off, still less an exercise in futility. First, as already described, the process of proof of debt in insolvency shares many of the attractive features of adjudication, in terms of speed, simplicity, proportionality and economy, but adjudication has the added advantage that a construction dispute arising during an insolvency will be more amenable to resolution by a professional construction expert than by many liquidators.

- 62. In many cases, disputed cross-claims needing to be resolved as a prelude to a final arithmetical set-off account will both, or all, arise under the same construction contract, as in the present case, because all the mutual dealings between the parties will have arisen under the aegis of that single contract. Even if they arise under more than one construction contract, the adjudicator will be better placed than most liquidators to resolve them. The Scheme contains provision whereby that may be achieved by consent, and the need to take cross-claims into account as defences (by way of set-off) may well mean that there is in reality one single dispute within Akenhead J's helpful rule of thumb in the Witney Town Council case...
- 64. Thus it is no answer to the utility (rather than futility) of construction adjudication in the context of insolvency set-off to say that the adjudicator's decision is unlikely to be summarily enforceable. The reasons why summary enforcement will frequently be unavailable are set out in detail in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2001] 1 All ER (Comm) 1041 , paras 29-35 per Chadwick LJ. As he says, the court is well-placed to deal with those difficulties at the summary judgment stage, simply by refusing it in an appropriate case as a matter of discretion, or by granting it, but with a stay of execution. There is in those circumstances no need for an injunction, still less a need to prevent the adjudication from running its speedy course, as a potentially useful means of ADR in its own right.

Supreme Court - Enforcement



- Enforcement was a separate question
- Ought to be considered on a case by case basis as AND when enforcement proceedings were commenced
- “Where there remains a real risk 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.” [67]

Reasoning on enforcement

- 65. Furthermore it will not be in every case that summary enforcement will be inappropriate. 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. 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. If that is in favour of the company, there is again no reason arising merely from the existence of cross-claims why it should not be summarily enforced.
- 66. True it is that the adjudicator may over-value the net balance in favour of the company, so that summary enforcement may leave the respondent to the reference having first to establish a true balance in its favour and then to pursue it by proof (or possibly as a liquidation expense) against an under-funded liquidation estate. But over-valuation is a problem that may arise in any liquidation context, even where there is no cross-claim. There is no suggestion that, absent insolvency set-off, adjudication is ordinarily futile merely because the company making the reference is in liquidation or distributing administration.
- 67. The proper answer to all these issues about enforcement is that they can be dealt with, as Chadwick LJ suggested, 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 Meadows case. Where there remains a real risk 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.

Implications of the Supreme Court decision



- Court has endorsed the use of adjudication in cases involving insolvency companies
- Will this open the floodgates?
- Will solvent Responding Parties be open to commercial blackmail?
- But what effect will their position on enforcement have?

Further lessons



- **Companies in CVA**
 - CVAs will likely be treated differently from liquidation

- **Jurisdictional objections**
 - Coulson LJ's comments in the CoA on waiver in relation to jurisdiction challenges

**Thank you for listening.
Any Questions?**

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