



The Supreme Court sanctions the use of adjudication in the insolvency context: Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25

The Supreme Court has given [judgment](#) in what is being hailed as a landmark case in the construction and insolvency spheres. The decision has not only eliminated any doubt that there is jurisdiction for an insolvent company to adjudicate against a respondent with a potential cross-claim, but it has also endorsed the use of adjudication as a helpful tool for liquidators.

The key facts

Bresco agreed to perform electrical installation works for Lonsdale. Bresco later ceased to attend the construction site, alleging much later that it did so by way of acceptance of Lonsdale's repudiatory breach. Bresco subsequently entered into CVL in 2015. Both parties later made claims against each other for breach of the construction contract. Bresco's liquidator sought to refer the dispute to adjudication (it had both a statutory and contractual right to do so). Lonsdale issued Part 8 proceedings in the TCC for a declaration that the Adjudicator lacked jurisdiction and for an injunction restraining further conduct of the adjudication.

The trial judge, Fraser J, acceded to Lonsdale's case on lack of jurisdiction. The Court of Appeal reversed Fraser J's decision on jurisdiction but held that the injunction should nevertheless be continued because, since there could be no enforcement of the Adjudicator's award, it would be an exercise in futility and a waste of time and money. Bresco appealed to the Supreme Court against the continuation of the injunction. Lonsdale cross-appealed on jurisdiction.

The decision in summary

The Supreme Court were unanimous in their decision. Lord Briggs, giving the lead judgment, firmly put to bed the notion that there is any incompatibility between construction adjudication, including the set-off of cross-claims, and the insolvency regime.

The jurisdiction cross-appeal: In concluding that there was jurisdiction to refer a dispute to adjudication, the Supreme Court took the view that the 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 any disputed cross-claim simply "*melt away*" in favour of a single dispute in the insolvency. The cross-appeal accordingly failed.

The futility appeal: The Supreme Court reached the opposite conclusion to the Court of Appeal on the issue of futility, allowing Bresco's appeal. Their starting point was that it is only in very exceptional circumstances that injunctive relief may restrain an attempt to enforce a contractual right (still less a statutory right) and this "*very steep hurdle*" was not surmounted by insolvency set-off. Lord Briggs commented that adjudication has become a "*mainstream method of ADR*" leading to the final resolution of most of the disputes referred to adjudicators.

In the Supreme Court's view, construction adjudication in the insolvency setting is not an "*exercise in futility*", in particular because:

- adjudication shares many of the attractive features of the process of proof of debt (speed, simplicity, proportionality and economy) but with the additional advantage that a construction dispute arising during an insolvency will be more amenable to resolution by a professional construction expert than by many liquidators; and
- the adjudicator's resolution of the dispute might be of real utility to the conduct of the process of set-off within the insolvency process as a whole.

Lord Briggs did, however, sound a note of caution that adjudication's speed and economy come at an inevitable price in terms of reliability when compared with arbitration and litigation, since there is no formal avenue of appeal. The answer to this is that a dissatisfied party can insist on having the dispute redetermined *de novo* in court or arbitration.

Practical implications

The key take-away from *Bresco* is that companies in liquidation can now freely adjudicate against a respondent with a potential cross-claim. Insolvency practitioners now have the green light to use adjudication as a quick and cost-effective tool to determine the value of claims and cross-claims in the construction sphere. However, the restrictions on an insolvent company's ability to enforce an adjudication award remain a consideration that should be borne in mind.

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