

Construction Law Update

Insolvent Company Enforcing an Adjudicator's Decision – Applying the Principles

The recent case of *John Doyle Construction Limited v Erith Contractors Limited* is the first reported judgment that applies the decision in *Bresco*. In this case Fraser J in the Technology and Construction Court set out the principles that the court will apply when considering the enforcement of an adjudicator's decision in favour of an insolvent company.

Background

John Doyle Construction Limited (“**John Doyle**”) and Erith Contractors Limited (“**Erith**”) entered into a contract for hard landscaping works at the Olympic Park to be performed before the 2012 Olympic Games.

John Doyle went into administration on 21 June 2012 and then entered a creditors voluntary liquidation on 13 June 2013. However, John Doyle had commenced an adjudication against Erith on 22 January 2018 for sums John Doyle claimed to be due on their final account. The claim was for approximately £4 million but the adjudicator awarded John Doyle approximately £1.2 million including VAT and interest.

Despite John Doyle being insolvent, they sought to enforce the adjudicator's decision.

The *Bresco* decision

As has been widely discussed recently, in the case of *Bresco Electrical Services Limited v Michael J Lonsdale (Electrical) Limited* the UK Supreme Court decided that an insolvent party can adjudicate a dispute. However, the Supreme Court also stated that, due to the insolvency, it may be that the adjudicator's decision would not be enforced, but that this was an issue for the court in the enforcement proceedings. In overcoming these issues, the insolvent party would need to provide appropriate undertakings and security.

The decision in *Bresco* has opened the floodgates to adjudications by insolvent companies. However, there are a number of other obstacles that need to be

overcome by insolvent companies before the adjudication decision can be enforced.

What are these obstacles and how does the court address them?

Fraser J set out the following five principles to be applied by the court when considering an application for summary judgment on an adjudication decision in favour of a company in liquidation:

1. Does the adjudicator's decision cover the whole of the parties' financial dealings under the construction contract in question, or simply one element of it?
2. Are there mutual dealings between the parties that are outside the construction contract under which the adjudicator has resolved the particular dispute?
3. Are there other defences available to the defendant that were not deployed in the adjudication?
4. Is the liquidator prepared to offer appropriate undertakings, such as ring-fencing the enforcement proceeds and/or is other security available?
5. Is there a real risk that the summary enforcement of an adjudication decision will deprive the paying party of security for its cross-claim?

In expanding on these five principles, Fraser J pointed out that so called "smash and grab" adjudications would rarely, if ever, be susceptible to enforcement by way of summary judgment by a company in liquidation.

Fraser J also stressed that adequate security must be offered in relation to any cross-claims the other party might have that were not considered in the adjudication. Given the nature of insolvency set off, these cross-claims would by definition include the right to seek a final resolution of the underlying dispute either by litigation or arbitration.

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Was adequate security offered?

In this case, Fraser J considered in detail the adequacy of the security offered by John Doyle.

Although John Doyle had not offered to ring fence the sums awarded by the adjudicator in a special account pending final determination proceedings, they had purported to offer security in the form of an alleged letter of credit and an 'After the Event' insurance policy in respect of Erith's costs. However, Fraser J concluded that the alleged letter of credit was in fact merely a letter of intent to apply to a bank for credit. He also found that the 'After the Event' insurance policy was inadequate because it contained material exclusions and avoidance provisions, as well as the fact it had not been procured by the liquidators themselves.

What did the TCC decide?

On the facts, this was a final account dispute, therefore, the adjudicator's decision covered the whole of the parties' financial dealings under the construction contract. However, ultimately, the court declined to grant summary judgment of the adjudicator's decision because John Doyle had failed to provide adequate security for Erith's cross-claims or for Erith's costs of bringing such a claim.

Analysis

This judgment offers welcome clarification of how the Supreme Court's decision in *Bresco* will apply in practice. The five principles set out by Fraser J will no doubt become the basis of later court decisions about whether an adjudicator's decision in favour of an insolvent party should be enforced.

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