



## #HardwickeBrew Your Takeaway Cup

### #Hardwicke Brew – Construction/Insolvency

#### The decision in *Bresco v Lonsdale*

*These notes follow the #HardwickeBrew given by Sarah McCann, Helena White, Aileen McErlean and Kort Egan (moderating) of Hardwicke's Construction and Insolvency Teams on 23rd June 2020 which looked at the Supreme Court's decision in Bresco v Lonsdale [2020] UKSC 25 and its impact on an insolvent company's right to obtain and enforce an adjudicator's decision. All the information below is correct as at 23<sup>rd</sup> June 2020.*

- The Supreme Court has now cleared the way for insolvent companies in administration or liquidation, to refer disputes under construction contracts to adjudication. Lord Briggs confirmed that the TCC will only now be able to issue an injunction to restrain an adjudication “very exceptionally”, since it would ordinarily be entirely inappropriate to prevent a party enforcing their contractual, still less their statutory, right to adjudicate. Insofar as there might be issues at the enforcement stage, those were unlikely to be relevant to the grant of an injunction but should be sorted out on enforcement.
- **Jurisdiction:** Lord Briggs held that the adjudicator does have jurisdiction to decide a dispute referred because the claims and cross-claim extant under the contract just prior to insolvency do not simply melt away by reason of the insolvency set-off rules. The claims/cross-claims are not rendered incapable of adjudication, having been replaced by a dispute in the insolvency.
- The court said that to hold otherwise would be a triumph of technicality over substance, based on an over-literal reading of Lord Hoffmann in *Stein v Blake*. Ultimately, the court

agreed with the main plank of the reasoning of Coulson LJ in the Court of Appeal that if a liquidator was entitled to pursue the company's claims by arbitration then, by analogy, they must similarly retain the right to refer disputes to adjudication.

- **Futility:** The Supreme Court disagreed with the reasoning of the Court of Appeal on the issue of futility/utility of adjudication in the insolvency context and held that referring disputes to adjudication was likely to have some practical utility.
- Lord Briggs noted that the vast majority of adjudicators' decisions did *de facto* end up being "final", notwithstanding the fact that they could in theory be overturned in later proceedings or by agreement, because, ultimately, they were not in fact challenged by the paying party. On that basis alone, there was reason to think that an adjudication might resolve any dispute between the parties, especially where their mutual dealings were in respect of one construction contract.
- The Supreme Court acknowledged that the single dispute rule meant that the referring party could define the dispute narrowly to their advantage. However, the responding party was entitled to raise by way of defence (although not as separate monetary award) any cross-claims it was entitled to raise.
- Even if the dispute referred did not encapsulate all of the claims and cross-claims that existed between the parties, that was not a bar to adjudication. In terms of effecting insolvency set-off, a liquidator could decide to unpick a complex web of mutual transactions by referring some disputes to adjudication, some to arbitration and resolving others by litigation if the liquidator considered it 'economical and pragmatic' to do so. Ultimately, the Supreme Court was content that a liquidator could still find a 'slice and dice' approach useful in making their assessment of the various claims that ought to be set off against each other in the insolvency.
- **Enforcement:** Lord Briggs held that one of the reasons adjudications should be allowed to proceed, in the first instance, was that any issues relating to the efficacy of actually enforcing the decision produced by the Adjudicator could and should be left to the enforcement stage.
- This decision does not interfere with the right of a defendant to enforcement proceedings to raise any of the usual defences (i.e. no crystallised dispute, breach of natural justice during the adjudication itself). The Supreme Court also made clear that, where summary enforcement would deprive the defendant of its right to have recourse to the company's claim as security for its "cross-claims", the TCC would be astute to refuse summary judgment.
- Precisely what Lord Briggs meant by "cross-claims" requires further consideration. He acknowledged in his Judgment that there may be "cross-claims" that cannot be wrapped up in the adjudication, such as the parties' liability for personal injuries claim or other mutual dealings in respect of an entirely unrelated area of commercial dealings (i.e. not in respect of works under a construction contract). However, it is difficult to see how, on the basis of ordinary adjudication principles, the mere prospect of such separate and unrelated "cross-claims" being litigated at a later date could affect the TCC's decision as to whether to allow

enforcement of the decision. It would be a question on the particular facts of the case whether the court felt that a stay of enforcement was justified. Even so, it is likely to be only the rarest of occasions when that situation will actually arise.

- However, what Lord Briggs must be taken to have included in his analysis of “cross-claims” (although that is not quite what it is) is the claim that a defendant would ordinarily have, post-enforcement, to overturn the Adjudicator’s decision. Lord Briggs appears to frame such a situation as being one where claims and cross-claims have formed part of the same dispute in the Adjudication, such that the Adjudicator’s decision was capable of determining the net balance. Lord Briggs held that the mere existence of a cross-claim in that situation should not be a bar to summary enforcement.
- Therefore, the battle lines on enforcement will remain – at least while the court refines the principles to be applied where the claimant in an enforcement is a company already in liquidation or administration – whether the security being offered by the insolvent claimant will provide adequate protection should the defendant successfully overturn the Adjudicator’s decision. Following the general reasoning of the Supreme Court, however, it is likely that defendants are going to have to show both a sincere intention of issuing proceedings to overturn the decision and show *bona fide* criticisms of the security offered.

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