

Successful enforcement of an adjudicator's decision in favour of an insolvent company (Styles & Wood v GE CIF Trustees)

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Construction analysis: In this case, decided in the County Court at Central London on 4 September 2020, the court enforced an adjudicator's decision in favour of a party in administration, taking into account the decisions in *Bresco* and *Meadowside Building Developments*. Written by Neil Armstrong, partner and head of construction, and Jack Duncanson, solicitor, at Myerson Solicitors LLP.

Styles & Wood Ltd (in administration) v GE CIF Trustees Ltd ([Case No G20CL072](#))

What are the practical implications of this case?

This is perhaps the first summary judgment to enforce an adjudicator's decision in favour of a party in liquidation. The purpose of this analysis is to explain how the claimant, Styles & Wood Ltd (S&W), complied with the requirements for satisfactory security so as to facilitate enforcement. This case sets a valuable precedent which will be of great assistance to construction and insolvency practitioners advising in this area.

The law has come a long way since Lord Justice Coulson's famous Court of Appeal judgment in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* [[2019](#) EWCA Civ 27] (which Lord Briggs overturned in the Supreme Court ([\[2020\] UKSC 25](#))), where he referred to obtaining an adjudicator's decision in favour of an insolvent company as being 'an exercise in futility'.

Nevertheless, there remain several legal and practical hurdles which an insolvent company will need to overcome to secure enforcement of an adjudicator's decision. Failure to do so, as can be seen by the recent case of *John Doyle Construction Ltd (in liquidation) v Erith Contractors Ltd* [[2020](#) EWHC 2451 (TCC)], will mean the court will be astute to refuse summary judgment.

What was the background?

S&W, a Manchester-based fit-out firm, entered into a building contract with GE CIF Trustees Ltd (GECIF) for office to residential conversion works at St Ann's Square in Manchester. The contract incorporated the 'JCT Intermediate Building Contract with contractor's design 2011' with amendments.

After practical completion, a dispute arose between the parties in respect of the final account. This dispute was referred to adjudication in February 2020, and part way through the adjudication S&W entered administration.

In April 2020, the adjudicator issued a decision which awarded a substantial sum to S&W.

GECIF refused to comply with the adjudicator's decision on the ground of futility and sought a stay of execution. S&W brought enforcement proceedings before the courts which were heard on 4 September 2020 before His Honourable Judge Parfitt.

The legal principles

The hearing proceeded in light of the recent Supreme Court judgment in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* [[2020](#) UKSC 25].

In *Bresco* the Supreme Court held that the adjudication of disputes under construction contracts cannot be enjoined or restrained on the ground of a party's insolvency and that any issues as to insolvency will be addressed at the enforcement stage. See in particular paras [59] and [67] of Lord Briggs' judgment:

'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.'

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 ringfence any enforcement proceeds: *see the discussion of undertakings in the Meadowside 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. [emphasis added]

When it came to enforcement of an adjudicator's decision, the Supreme Court at para [67] recognised the approach of Adam Constable QC in *Meadowside Building Developments Ltd (in liquidation) v 12 -18 Hill Street Management Co Ltd* [2019] EWHC 2651 (TCC). The requirements for satisfactory security for enforcement in favour of a party in administration are set out in *Meadowside* at para [87](2) of the judgment:

'For these reasons, in my judgment, a case is likely to be an exception to the ordinary position in circumstances where:

(2) Satisfactory security is provided both:

a) In respect of any sum awarded in the adjudication and successfully enforced, so that it is repayable should the responding party successfully overturn the decision in litigation or arbitration brought within a reasonable time of the date of enforcement;

b) In respect of any adverse order for costs made against (or agreed by) the company in liquidation in favour of the responding party in respect of:

(i) Any unsuccessful application to enforce the adjudication decision;*

(ii) The subsequent litigation/arbitration, in which the responding party is seeking to overturn the adjudication decision;

The extent to which any such costs order is ordered to be met from the security would be a matter for the Court, insofar as it was not agreed.

(3) What is satisfactory as security in form, duration and amount is a question on the facts in the ordinary way and may be provided incrementally (as it would be, for example, in any security for costs application). A combination of the following solutions might be appropriate:

(a) the liquidator undertaking to the Court to ringfence the sum enforced so that it is not available for distribution for the relevant duration;

(b) a third party providing a guarantee or a bond;

(c) ATE insurance.'

*The reference in *Meadowside* to providing security for the costs of the enforcement hearing (as opposed to the costs of final determinative proceedings) no longer applies. The Supreme Court in *Bresco* held that a statutory or contractual adjudication could not be enjoined or restrained. It follows that each party has a right to seek to enforce an adjudicator's decision and does not have to provide security for the costs of enforcement.

What did the court decide?

In this case, the security put forwarded by S&W took the form of an after-the-event (ATE) insurance policy to cover any potential adverse costs awarded in any subsequent final determination proceedings; and an undertaking by S&W's administrators (acting on behalf of the company) to ringfence the sums awarded by the adjudicator. The joint administrators provided such an undertaking, as themselves officers of the court, to ringfence the enforcement sums pending the resolution of any final determination proceedings. In effect, GECIF has a period following enforcement to bring arbitration proceedings and, if they did, the funds would remain held pending the outcome of those proceedings. If not, the funds could be released to the administrators.

GECIF raised, unsuccessfully, several issues including complaints about S&W's financial position, the assertion that final determination proceedings would shortly be commenced and various complaints about the substance of the adjudicator's decision. The key objection, however, was that the level of cover secured by the ATE insurance policy was inadequate. GECIF argued that the likely costs that GECIF may be awarded in arbitration could be up to five times that of the level of ATE insurance.

S&W made submissions on the level of costs anticipated by GECIF in any final determination proceedings and the level of ATE cover required, including whether it is appropriate for the court to consider the level of cover against the backdrop of incremental security (ie the possibility of coming back for further security), which is certainly something that the court is very used to doing in the context of security for costs.

HHJ Parfitt agreed with S&W's submissions. He referred to GECIF's broad-brush approach in respect of the level of costs to be wholly unpersuasive and that their cost breakdown seemed neither serious nor substantive.

GECIF also referred to concerns about the wording and substance of S&W's ATE insurance policy and proposed undertaking for the ringfencing arguing that these rendered the security as inadequate. During the proceedings, S&W addressed these concerns with amendments being made to the ATE insurance policy and the provision of supplementary undertakings on the part of the administrators of S&W.

GECIF also unsuccessfully argued that there were defects in the works that had not been determined by the adjudicator's decision which therefore did not comprise a net balance of the dealings between the parties in accordance with the Insolvency Rules 2016, [SI 1986/1925, r 14.25](#).

At the hearing, HHJ Parfitt found in favour of S&W and ordered that the claimant's application for summary judgment and enforcement of the adjudicator's decision be granted on the condition that the ATE insurance policy at the current level provided by S&W remains in force and S&W's administrators provide the necessary undertakings.

This is perhaps the first case in which an insolvent party has successfully enforced an adjudicator's award in the courts since the Supreme Court decision in *Bresco*.

Case details

- Court: County Court at Central London
- Judge: HHJ Parfitt
- Date of judgment: 4 September 2020

Neil Armstrong is partner and head of construction, and Jack Duncanson is a solicitor at Myerson Solicitors LLP. The Myerson team was led in this case by Neil Armstrong and Jack Duncanson with Riaz Hussain QC of Atkin Chambers as counsel. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysis@lexisnexis.co.uk.