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Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd

by Laura Bowler

Reference: [2020] UKSC 25

Date: 17 June 2020

Judge: Lord Reed, Lord Briggs, Lord Kitchin, Lord Hamblen, Lord Leggatt

IThis appeal and cross-appeal raised important questions in respect of the right of insolvent companies to adjudicate under s.108 of the Housing Grants, Construction and Regeneration Act 1996 ("the HGCRA 1996") as against the Insolvency Act 1986 (now rule 14.25 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024)) ("the IR").The issues before the Supreme Court were an appeal by Bresco from the Court of Appeal in respect of an injunction restraining the pursuit of the adjudication and a cross-appeal from Lonsdale seeking to restore the judge's ruling that the adjudicator lacked jurisdiction.

Background

By way of background, Bresco Electrical Services Ltd ("Bresco") entered into a sub-subcontract in August 2014 with Michael J Lonsdale (Electrical) Ltd ("Lonsdale") for electrical installation works at a site in London. In December 2014, Bresco stopped attending site, alleging acceptance of a repudiatory breach of the contract by Lonsdale. In March 2015, Bresco went into creditors' voluntary liquidation.

The parties made a number of claims against each other and, on 18 June 2018, Bresco served a notice of intention to refer a dispute to adjudication. Lonsdale responded on 22 June 2018 asserting that the adjudicator had no jurisdiction as Bresco was insolvent. Lonsdale also issued proceedings in the TCC for a declaration that the adjudicator lacked jurisdiction and for an injunction restraining the further conduct of the adjudication.

At first instance, Fraser J agreed that the adjudicator did not have jurisdiction. However, on appeal, Bresco was successful in defeating this jurisdictional argument. Notwithstanding this success, the Court of Appeal held that the injunction restraining further conduct of an adjudication should remain in place on the basis that, since there would certainly be a stay of execution of any enforcement proceedings, an adjudication would be an "*exercise in futility*" and was a waste of time and money. Bresco appealed on the injunction and Lonsdale cross-appealed the jurisdictional decision.

Jurisdiction of the adjudicator

Lord Briggs, turning first to Lonsdale's cross-appeal, held that construction adjudication was compatible with the Insolvency Code and with insolvency set-off. Considering Lonsdale's submission that the dispute submitted for adjudication was replaced by the balance of a single claim (made up of all the claims and cross-claims between the parties) and that, as a result of this balance, a claim existed in insolvency rather than contract, Lord Briggs explained that the claims under the contract did not "*simply melt away and render them incapable of adjudication*". As a result, the cross-appeal was dismissed and the Supreme Court confirmed that the adjudicator did have jurisdiction.

Futility

Lord Briggs considered extracts of the reasoning provided by Coulson LJ in the Court of Appeal. He also noted that, in reaching its decision, the Court of Appeal had regard to considerations such as the potential waste of limited resources by the liquidator and a potential to expose the respondent to the reference of wasted costs in a futile process – with no recoverability if successful.

He held that the starting point is that the insolvent company has both a statutory and contractual right to adjudicate once it is accepted that there is jurisdiction under s.108 of the HGCRA 1996. He explained that adjudication has become a "*mainstream method*" of ADR in construction and that there was no basis for concluding that it was incompatible with insolvency. In fact, as set out within the judgment, Lord Briggs drew attention to the "*attractive features*" of adjudication and drew similarities between insolvency and adjudication – such as the speed at which issues are dealt with and the economy of the process.

Moving on to the consideration of cross-claims, Lord Briggs noted that, in many cases, disputed cross-claims that will need to be resolved will most likely arise under the same construction contract. To the extent that there are multiple construction contracts that the claims arise from, it was held that the adjudicator is best placed to resolve them, not the liquidator. Turning to cases where the effect of Insolvency Set-Off results in cross-claims that extend beyond the scope of construction contracts (such as personal injury claims), it was held that adjudicators may need to have regard for cross-claims if they amount to a disputed construction claim or they may have to simply make a declaration as to the value, leaving the cross-claim to be resolved by other means. It was noted that this was "*well within*" the adjudicator's powers.

Lord Briggs also emphasised that there is a real utility to the conduct of the process of insolvency set-off if the adjudicator resolves the construction dispute referred by the liquidator.

The judgment acknowledges that the court is well placed to deal with difficulties at summary judgment either by refusing it or granting a summary judgment with a stay of execution. Lord Briggs thought that, in many cases, the liquidator will not seek to enforce the adjudicator's decision summarily or, if they do, the liquidator may have to offer appropriate undertakings, such as to ring-fence enforcement proceedings. Finally, he also explained that the court would be astute to refuse a summary judgment if there is a risk that summary enforcement will deprive the respondent of recourse to the company as to security for its cross - claim.

Lonsdale submitted that, in the context of insolvency, a joint and several liability to pay the adjudicator's costs and expenses may leave the respondent having to pay whole of those costs with no recourse, even if it is successful in the adjudication. Lord Briggs rejected this view explaining that costs and burdens militate against rather than favour applications for injunctions. He also explained that, whilst not a complete guarantee of payment, the liability of the company will be a liquidation expense rather than a matter of proof as set out in IR 7.108(4)(a)(ii).

Therefore, Bresco's appeal was allowed.

Things to consider

Throughout the Judgment, Lord Briggs emphasised that the adjudication process was an alternative dispute resolution process that should be utilised by parties. He also made it clear that, in his view (shared by the whole of the Supreme Court) there were no compatibility issues between s.108 HGCRA 1996 and the IR and that, in fact, adjudication could be a useful tool for liquidators.

Whilst this decision will be good news for companies in liquidation, for those that find themselves responding to an adjudication where the referring party is in liquidation, it could be problematic as the responding party could find themselves liable to the entirety of the adjudicator's costs and expenses even if they win the adjudication. Whilst Lord Briggs did acknowledge that there may be relief under IR 7.108(4)(a)(ii), only time will tell as to how effective this may be.