

# WHEN CAN INSOLVENT COMPANIES ADJUDICATE? THE LATEST POSITION PENDING THE SUPREME COURT DECISION IN BRESCO V LONSDALE [2019]

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We have previously reported on the developing area of adjudication by insolvent companies, now the subject of another key judgment. In [Balfour Beatty Civil Engineering Limited and Astec Projects Limited \(in liquidation\) \[2020\]](#) the Technology and Construction Court (TCC) has provided a further clear example of the type of strict conditions that will need to be satisfied to enable such adjudications to proceed.

This area of the interaction between insolvency and adjudication is developing fast - the Supreme Court hearing in the appeal of the leading case of [Bresco Electrical Services Ltd v Michael J Lonsdale \(Electrical\) Ltd \[2019\]](#) took place over the last two days and whilst we await the judgment, we analyse the approach of the TCC in the recent decision of [Balfour Beatty Civil Engineering Limited and Astec Projects Limited \(in liquidation\) \[2020\]](#).

## The background: Bresco and Meadowside

In [Bresco Electrical Services Ltd v Michael J Lonsdale \(Electrical\) Ltd \[2019\]](#), the Court of Appeal (with the leading judgment given by Lord Justice Coulson) concluded that there was no absolute jurisdictional bar preventing an insolvent claimant commencing and pursuing an adjudication - we reviewed that decision in '[A lesson in practical utility](#)'.

Notwithstanding the Court of Appeal's conclusion in Bresco, Lord Justice Coulson noted (in that judgment) that there still remained the existence of a "fundamental incompatibility" between the adjudication regime on the one hand and the insolvency set-off regime on the other. This incompatibility was reflected in the ultimate outcome in Bresco, because whilst it was not said that the adjudicator would have no jurisdiction at all because of the insolvency, it was thought that in this case (and very many others) an adjudication would

be futile or pointless because it could never reach a position where the ultimate mutual account could be determined as a result of the adjudication. This together with difficulties arising out of security would mean that any adjudication decision in the circumstances would never be enforced.

This "baseline" was considered in great detail by Adam Constable QC sitting as a Judge in the High Court in Meadowside Building Developments Ltd (in liquidation) v 12-18 Hill Street Management Company Ltd [2019] - we reviewed this in 'Adjudication watch 2019: case law review part 3'.

In his judgment, Adam Constable QC set out what he considered to be the exceptions to the default position that adjudication decisions in favour of insolvent companies would not be enforced.

As previously reported, the "rules" (the Meadowside Conditions) set out in his judgment were as follows (summarising):

- the adjudication will determine the final net position between the parties;
- "satisfactory security" is provided in respect both of the adjudication award and any adverse costs award in related proceedings - notably here, what is satisfactory as security will be a matter of fact in each case; and
- any agreement to provide funding or security must not amount to an abuse of process.

## The latest application of Bresco and Meadowside

In Balfour Beatty Civil Engineering Limited and Astec Projects Limited (in liquidation) [2020] the Technology and Construction Court (TCC) considered the Meadowside Conditions in the context of an application for an injunction by Balfour Beatty to prevent Astec continuing with an adjudication.

The matter that came before Mr Justice Waksman concerned various works to and around Blackfriars station. There were three contracts between the parties called "the North Contract", "the South Station" and "the Lighting Boom". Balfour Beatty sought an injunction on the basis that it considered the particular position of Astec as an insolvent company fell **outside** the Meadowside Conditions and therefore no adjudications should proceed.

## Astec's insolvency and the claims

In relation to the timeline involved, this is somewhat protracted. In April 2014, Astec went into administration - then liquidation in October 2014. A notice of funding was issued from Astec's then solicitors in 2016 in relation to claims in the region of £4 million in respect of work done and not paid, plus loss and expense. On 24 December 2019, Astec's present solicitors sent a letter of claim which was followed by a first notice of adjudication sent on 24 January 2020 in relation to the North Contract. In fact, Astec intended to adjudicate on all three contracts.

Balfour Beatty in turn rejected Astec's claims and claimed a net sum due to it of around £1 million.

## Balfour Beatty's application

One of the key arguments put forward by Balfour Beatty in the TCC was referred to as the "Three Adjudications" Point.

Balfour Beatty argued that a single adjudication by definition would not be able to determine the net position between the parties which have dealings on more than one contract. Mr Justice Waksman did not consider there was any merit in this point. His view was that when taken together, adjudications on the three contracts would deal with the entirety of the mutual dealings between the parties and would mirror Rule 14.25 of the Insolvency (England and Wales) Rules (SI 2016/1024). His view was that, on the basis of any application for summary judgment (and here, there could be three separate applications for enforcement), a judge could carry out a calculation across the three adjudications to determine the net result. Mr Justice Waksman's view was that this would not be a matter of the TCC "taking an account" as provided for in the Insolvency Rules, but "simply doing a straightforward mathematical calculation".

## Conditions for the adjudications taking place

The next step was to consider whether or not the Meadowside Conditions could be made out and, whether any specific conditions were required.

In summary, the TCC refused the injunction sought by Balfour Beatty, deciding that Astec **should** be allowed to bring adjudications on each of the three contracts on certain specific

conditions relating to the provision of sufficient security, as contemplated by the judgment in Meadowside. Those conditions are summarised below.

- The notices of adjudication for the two remaining adjudications should be issued within 21 days of this judgment.
- The parties should ensure that the same adjudicator is appointed to deal with all three adjudications.
- The three adjudications should be dealt together with a combined time limit of at least 84 days for the entirety of the three adjudications, with the option for the parties to agree that a single adjudicator could deal with all three contractual disputes in one adjudication.
- Following the issue of all three decisions (or one, if the parties so agree), Balfour Beatty will have six months in which to bring legal proceedings to seek a different result (or not).
- If Balfour Beatty does issue such proceedings within the six months, then Astec cannot seek to enforce any adjudication decision until the litigation ends.
- Astec would need to provide security for costs in the amount of £750,000.

Mr Justice Waksman also made two specific changes to the wording/interpretation of Astec's insurance policy to clarify particular aspects of the costs protection.

## **The Supreme Court in Bresco and beyond**

In the landscape of lockdown, an economic downturn and at some point, a "new normal", the interaction of insolvency and adjudication is unfortunately likely to become more and more significant for the construction industry. The decision in Astec has emphasised the fact that, whilst adjudication by an insolvent company is not impossible, where it is to be permitted, the courts will impose stringent conditions that are based specifically on the facts of each case.

The Supreme Court decision in *Bresco v Lonsdale* will be significant and timely, with wide ranging implications going forward that were not and could not have been foreseen at the time of the Court of Appeal judgment last year.

We will report on the Supreme Court decision as soon as it is handed down.

If you have any queries on this issue, please contact Michael O'Shea.

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