TOPICAL ISSUE – 283 June 2020

Bresco Electrical Services Ltd (In liquidation) v Michael J. Lonsdale

The Supreme Court has now delivered its decision on both appeal and cross-appeal about the compatibility of the Adjudication Regime and the Insolvency Rules 2016.

In essence their Lordships have decided that there is no conflict between the two regimes, this means that Liquidators can now initiate adjudications to resolve construction disputes, even though, as the Supreme Court Conceded in paragraph 60 of its Judgement, Summary Judgement based upon the adjudicators decision may be inappropriate for one or more reasons.

The Supreme Court in its Judgement recognised that the solving of cash flow problems was not the sole objective of adjudication; it was an important mainstream dispute resolution mechanism in its own right.

Much ink has been spilt as to whether the jurisdiction of adjudicators is to be treated as narrow, (because their status derives from statute) or broad adopting the approach in arbitration in the leading arbitration case of *Fiona Trust Holding Corporation v Privalov 2007 UK HL 40*, which decided that an arbitration agreement conferred a wide jurisdiction on the Arbitrator including such issues as repudiation and misrepresentation.

Paragraph 41 of the Judgement lends further credence to the view of a wide jurisdiction for adjudicators, Lord Briggs had this to say, *I am not persuaded that the statutory compulsion lying behind the conferral of the contractual right to adjudicate points at all towards giving the phrase "a dispute arising under the contract " a narrow meaning, by comparison with a contract freely negotiated. The fact that after due consideration of the Latham Report, Parliament considered that construction adjudication was such a good thing that all parties to construction contracts should have the right to go to adjudication, points if anything in the opposite direction.*

The futility Argument

The argument that enabled Lonsdale to succeed at the Appeal Court level was the Adjudication decision in favour of Bresco was '*an exercise in futility*' because the decision of an Adjudicator in favour of a company in liquidation would not ordinarily be enforced by the Court.

The Supreme Court's view was different. Given the adjudication was a dispute resolution mechanism in its own right; it should be permitted to proceed even when the result could not necessarily be summarily enforced.

Another point that Lonsdale raised was their exposure to the liability for the Adjudicator's fees on a joint and several liability basis meant that they would have no effective recourse against an insolvent company for its share of the Adjudicator's fees.

The Supreme Court found that such a liability would be a liquidation (or administration) expense rather than the matter of proof off debt pursuant to IR 7.108 (4) (a) (2).

Whilst this did not provide an absolute assurance that the funds held for this purpose by the Liquidator/Administrator would be sufficient to meet their responsibility to discharge the Adjudicator's fees it did in the words of the Supreme Court provide '*reasonable reassurance*'.

Conclusions

One of the attractive aspects of adjudication for Administrators and liquidators is that they do not have to worry about providing security for costs, as they would do if initiating normal Court proceedings.

We must therefore anticipate that many more claims will be pursued by Liquidators/Administrator's and by Solicitor/Claims Consultants prepared to take on these claims under some form of damages based agreement.

The Judgement also confirms that the jurisdiction of an adjudicator to deal with all maters arising out of or in connection with a contract is to be compared with that of an arbitrator, arguments that an adjudicator's jurisdiction is somehow more restricted.

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