

Adjudication jurisdiction, natural justice and enforcement in the time of COVID-19

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[John Denis-Smith](#) and [David Sawtell](#)



Welcome and introduction

- How the TCC is approaching COVID-19 and adjudication
- Alleging fraud as a defence to enforcement
- Hybrid contracts
- Adjudication and bonds / guarantees
- Crystallising the dispute, natural justice, severance

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• Adjudication by insolvent parties

Adjudication in the time of COVID-19

- MillChris Developments Ltd v Waters
[2020] 4 WLUK 45
- A pre-COVID-19 dispute
- A COVID-19 adjudication
- Natural Justice Injunction refused

Adjudication in the time of COVID-19

- Obtain and deploy evidence electronically
- Take steps to be able to secure evidence from unavailable (ill or furloughed) witnesses
- Agree extensions of time where possible
- Site visits are not a right (but cf Hatton v Connew [2013] EWCA Civ 1560)

Relying on fraud to resist enforcement

- PBS Energo A.S. v Bester Generacion UK Ltd [2020] EWCA Civ 404
- Failed power station project
- First adjudicator determined – subcontractor had validly terminated the subcontract
- Second adjudicator appointed to decide the subcontractor's losses

Relying on fraud to resist enforcement

- Adjudicator held that plant items were being stored, and could be delivered when paid
- Contractor alleged that it had subsequently discovered documents that showed they had been sold – alleged in its witness statement in response to enforcement proceedings that this was

Relying on fraud to resist enforcement

- First instance ([2019] EWHC 996 (TCC)) – Pepperall J held that contractor had an arguable case that the adjudicator's decision had been procured by fraud, refused to enforce the decision by granting summary judgment
- Appeal against this order was refused

Relying on fraud to resist enforcement

Coulson LJ:

- If the allegations of fraud were either (a) made, or (b) could and should have been made, in the adjudication then they cannot subsequently amount to a reason not to enforce the decision

Relying on fraud to resist enforcement

- If the adjudicator's decision was arguably procured by fraud or the evidence on which the adjudicator relied is shown to be both material and arguably fraudulent (as here) then such allegations can be a proper ground for resisting enforcement

Relying on fraud to resist enforcement

- Not necessary to plead and serve a defence alleging fraud at the enforcement stage (although this might be advisable) (CPR, r24(2))
- Fraud cannot be alleged in a witness statement or skeleton argument without both clear instructions and reasonably credible material establishing arguable case of fraud

Hybrid contracts and payment regimes

- The background: Cleveland Bridge (UK) LTd v Whessoe-Volker-Stevin Joint Venture (2010) 130 Con LR 159: Ramsey J:
- HG CRA 1996, s104(5): “this part applies to [an agreement] only so far as it relates to construction operations”
- The statute contemplates a position where one contract relates to both construction operations and excluded operations

Hybrid contracts and payment regimes

- May mean that a 'hybrid' contract is subject to two different payment regimes – one (under HGCR 1996) for construction operations, and one for excluded operations
- Statutory right to adjudication will only relate to disputes in respect of construction operations
- Open to parties to contract for the HGCR 1996 regime

Hybrid contracts and payment regimes

- C Spencer Ltd v MW High Tech Projects UK Ltd [2019] EWHC 2547 (TCC) and [2020] EWCA Civ 331
- Contract contained ‘construction operations’ under the Act and ‘non-construction’ operations outside the Act
- Does a valid payment notice under s.111 HGCRA 1996 need to identify those two elements separately?

Hybrid contracts and payment regimes

- Contract for a power plant. CSL engaged by MW to design and construct the works
- Interim payment application 32 – broke down the two different elements
- Payment notice did not separate the two elements. CSL argued it was invalid
- CSL commenced Part 8 proceedings

Hybrid contracts and payment regimes

- The contract contained the same payment regime (including payment notices / pay less notices) for construction / non-construction operations
- The adjudication provisions only applied so far as required by the HGCR 1996

Hybrid contracts and payment regimes

- CSL argued that the payment notice had to identify which parts were construction operations
- Held by O'Farrell J: parties are free to agree that non-construction operations should be subject to the same requirements as those contained in the Act
- In such a case, payment notice does not need to separately state the sums due

Hybrid contracts and payment regimes

- Court of Appeal (Coulson LJ) – agreed
- Possible for parties to contract *in* to the Act
- S.104(5) recognises that there will be hybrid contracts
- The parties here limited adjudication, but not the payment provisions

Adjudication and bonds/guarantees

- Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd [2020] EWHC 468 (TCC)
- JCT Design and Build Sub-Contract, 2011 Edition
- Claim by employer under bond, which required loss to be “established and ascertained”

Adjudication and bonds/guarantees

- No provision for third party certifier
- Adjudication decision may establish and ascertain loss to enable a valid claim under bond
- A valid claim following such ascertainment must be made prior to expiry of the bond
- Time may be pressing

Can an adjudicator get someone else to do their work?

- Dickie & Moore Ltd v McLeish and others
[2019] CSOH 71
- Pupil who carried out administrative roles
- “all of the material decisions on the matters in issue in the adjudication were taken by the adjudicator himself ”

Can an adjudicator get someone else to do their work?

- Babcock Marine (Clyde) Ltd v HS Barrier Coatings Ltd [2019] CSOH 110
- Clause 2.3 of the NEC Adjudicator's Contract (April 2013 edition)
- Role of QS announced in adjudicator's fee note after decision was made
- Could not be said role was not material
- Summary enforcement refused

Can an adjudicator get someone else to do their work?

- Lessons
- Explain third party's existence and role
- Clause 2.3 of the NEC Adjudicator's Contract may be read expansively
- Expect communications to be studied, including metadata (cf John Sisk & Son Ltd v Duro Felguera UK Ltd [2016] EWHC 81 (TCC))

Crystallising the dispute

- LJH Paving Ltd v Meeres Civil Engineering Ltd [2019] EWHC 2601
- (1) Crystallisation
- Asking questions about a claim does not mean there is no dispute
- Denial of a final account claim on timing grounds does not mean there is no dispute as to value

Multiple contracts

- LJH Paving Ltd v Meeres Civil Engineering Ltd [2019] EWHC 2601
- (2) Multiple Contracts
- If a notice of adjudication validly refers a dispute, a decision that sums are due under the relevant contract is made within jurisdiction, even if it is argued that they were incurred under another contract

Severance of an adjudicator's decision

- Dickie & Moore Ltd v McLeish and others (No 2) [2019] CSOH 87; 187 Con LR 202
- Contractor now argued that since the adjudicator had jurisdiction to decide the remainder of the dispute, part of his decision could be enforced
- The employer argued that the decision was a unity, meaning none of it could be enforced

Severance of an adjudicator's decision

- Decision of the Court of Session (Outer House) – Lord Doherty comprehensively reviewed the decisions both in England and Scotland on the issue of severance

Severance of an adjudicator's decision

- Coulson on Construction Adjudication (4th edition): para 15-32:
- “Accordingly, even where there is a single dispute, it appears that the court may, in the right circumstances, be prepared to enforce a part of the decision of the adjudicator, if that part is clearly and obviously untainted by the jurisdictional or natural justice problem, and can be readily identifiable.”

Severance of an adjudicator's decision

- Willow Corp SARL v MTD Contractors Ltd [2019] EWHC 1591 (TCC), (2019) 185 ConLR 97 (Pepperall J):
- Is anything left that can be safely enforced once one disregards to be obviously flawed reasoning
- Critical test is whether it is clear that there is “a core nucleus of the decision that can safely be enforced”

Severance of an adjudicator's decision

- Held: severance can be available even where there is a single dispute
- May be more difficult to show it had no impact
- Agreed with Pepperall J's observations in Willow
- Need to identify a core nucleus of the decision unaffected by the complaint

Severance of an adjudicator's decision

- In this case, a number of aspects of the decision were made separately and independently from his extension of time and loss and expense decisions
- Could be safely severed

Exceptions to the 'insolvency prohibition' in Bresco v Lonsdale

- Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2019] EWCA Civ 27, [2019] 3 All ER 337
- Adjudicator has threshold jurisdiction to determine a claim where referring party is insolvent
- But – in most circumstances – the exercise is futile, as a stay will be granted

Exceptions to the ‘insolvency prohibition’ in *Bresco v Lonsdale*

- *Bresco v Lonsdale*:
- “It would only be in exceptional circumstances that a company in insolvent liquidation (and facing a cross-claim) could refer a claim to adjudication, succeed in that adjudication, obtain summary judgment and avoid a stay of execution”
- Injunction continued on grounds of practical utility

Exceptions to the 'insolvency prohibition' in *Bresco v Lonsdale*

- Meadowside Building Developments Ltd (In Liquidation) v 12-18 Hill Street Management Co Ltd [2019] EWHC 2651 (TCC)
- Claimant, Meadowside, in insolvent liquidation
- Adjudicator appointed despite HSMC asking him to resign
- Decided net balance to Meadowside

Exceptions to the 'insolvency prohibition' in *Bresco v Lonsdale*

- The adjudication proceedings had been brought by a company, Pythagoras Capital Ltd, which acted for IPs
- It had given an undertaking to discharge any liability on behalf of Meadowside
- Offered guarantees in respect of enforcement
- HSMC said that this was champertous

Exceptions to the 'insolvency prohibition' in *Bresco v Lonsdale*

- Meadowside's application to enforce the decision was refused
- Realistic prospect of HSMC establishing the proceedings were an abuse of process
- Court considered the circumstances in which the correct balance between the Insolvency Rules and the HGCRA 1996 would be in favour of enforcement

Exceptions to the 'insolvency prohibition' in *Bresco v Lonsdale*

- (i) there is no cross-claim and/or where the adjudication determines the final net position between the parties
- (i.e. not payment notice disputes)

Exceptions to the 'insolvency prohibition' in *Bresco v Lonsdale*

- (ii) there is a satisfactory guarantee or security in relation to any sum awarded in the adjudication, and/or where the sum is temporarily ringfenced pending it becoming finally due
- (Otherwise, the *Wimbledon v Vago* [2005] EWHC 1086 (TCC), 101 Con LR 99 principles will be engaged)

Exceptions to the 'insolvency prohibition' in *Bresco v Lonsdale*

- (iii) there is satisfactory security in respect of any adverse costs order made against the company in liquidation in later proceedings (such as any enforcement hearing or subsequent litigation or arbitration)

Exceptions to the 'insolvency prohibition' in *Bresco v Lonsdale*

- (iv) any agreement as to funding / security permitting the company in liquidation must not amount to an abuse of process
- In this case – it was arguable that the Meadowside / Pythagoras agreement was champertous / not permitted by the Damages-Based Agreements Regulations 2013, and was an abuse of process

Exceptions to the 'insolvency prohibition' in *Bresco v Lonsdale*

- The vast majority of adjudications brought by a company in liquidation would not be suitable, irrespective of the question of security
- Court will injunct a party seeking to do so, and/or refuse to enforce the decision or grant a stay of execution

Thank you for attending

- <https://www.39essex.com/contracting-and-coronavirus/>
- Series of webinars presented by 39 Essex Chambers on construction, commercial, development and related areas - <https://www.39essex.com/category/seminars/>
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[John Denis-Smith](#)

john.denis-smith@39essex.com

[David Sawtell](#)

david.sawtell@39essex.com

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