



# Which grey areas remain over the interaction of insolvency set-off and construction law following Bresco?

Robert-Jan Temmink QC

❖ None.

❖ The End.

**JOB DONE**

# Phrases you don't hear very often

- ❖ “I will not be standing for leader of the Conservative Party”
- ❖ “I had such a lovely journey on the tube this morning”
- ❖ “Gorgeous weather for a picnic”
- ❖ “For reasons which will become apparent below I should make it plain at the outset that Mr Temmink QC.. had no involvement whatsoever in the earlier stages of the case”
- ❖ “to the extent that I suggested in *Enterprise* that the application of the Rule itself gave rise to a jurisdictional bar, **I was wrong to do so..**”

- ❖ **Lonsdale v Bresco** – Lonsdale in insolvent liquidation (unconnected with Bresco) commenced adjudication for unpaid sums. Adjudicator assumed jurisdiction. Bresco applied for an injunction to restrain the adjudication from continuing and were successful before Fraser J.
- ❖ **Primus v Cannon** – Primus in a CVA caused, they said, by Cannon’s repudiatory breach of contract. Commenced adjudication for losses on repudiation. Adjudicator assumed jurisdiction. Cannon reserved its position on jurisdiction. Adjudicator found for Primus. Cannon did not pay. On Primus’ application for summary judgment on the adjudication sum, jurisdiction not (adequately) raised and HHJ Waksman gave judgment and refused a stay.

# The facts in the Bresco appeal

- ❖ Bresco was a sub-sub electrical contractor
- ❖ Entered into insolvent liquidation (not caused by Lonsdale)
- ❖ Lonsdale intended to sue for costs arising from non-performance
- ❖ Bresco claimed for money owed prior to termination
- ❖ 3 years after the liquidation, Bresco commenced adjudication
- ❖ Lonsdale asked adjudicator to discontinue. He refused.
- ❖ Lonsdale sought and obtained an injunction preventing continuation of adjudication

- ❖ Granted declaration:
  - ✧ “A company in liquidation cannot refer a dispute to adjudication when that dispute includes (whether in whole or in part) determination of any claim for further sums said to be due to the referring party from the respondent party”
  
- ❖ Why?
  - ✧ An adjudicator did not have jurisdiction to deal with a claim advanced by a company in insolvent liquidation
  - ✧ Inconceivable that an adjudicator’s decision would be enforced against a company in insolvent liquidation

# Right to adjudication & effect of insolvency

- ❖ Well-known contractual and statutory right (s.108) to adjudication
- ❖ Rule 14.25(2)-(4) IR 1986:
  - ✧ An account must be taken of what is due from the company and the creditor to each other in respect of their mutual dealings and the sums due from the one must be set off against the sums due from the other
  - ✧ If there is a balance owed to the creditor then only that balance is provable in the winding up
  - ✧ If there is a balance owed to the company then that must be paid to the liquidator as part of the assets..

- ❖ Hoffmann: “..taking of the account really means no more than the calculation of the balance due in accordance with the principles of insolvency law”
- ❖ “The conclusion must be that the original chose in action ceases to exist and is replaced by a claim to a net balance. If the set-off is mandatory and self-executing and results, as of the bankruptcy date, in only a net balance being owing, I find it impossible to understand how the cross-claims can, as choses in action, each continue to exist”
- ❖ But Etherton LJ rejected that analysis in **Re Kaupthing Singer and Friedlander Ltd (in administration)** [2010] EWCA Civ 518

# Bouyges (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] EWCA Civ 507



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- ❖ The jurisdiction point had not been taken before Dyson J
- ❖ Chadwick LJ considered Hoffmann’s analysis: “..it was an incident of the rule that claims and cross-claims merge and are extinguished; so that, as between the insolvent and the other party, there is only a single claim – represented by the balance of the account between them”
- ❖ “where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in the liquidation, in which full account can be taken and a balance struck. That is what Rule 4.90 of the IR 1986 requires”

- ❖ HHJ Coulson: “..I conclude that, as a matter of law, the claim for sums due under [the contract] has, in the unequivocal words of Lord Hoffmann in *Stein v Blake* “ceased to exist”.. The only chose in action which continued to exist as an assignable item of property was the claim to a net balance”
- ❖ “[Counsel] argued that the claim under [the contract] did continue to exist because that was the way in which the balance could be ascertained under Rule 4.90. It seems to me that that suggestion was roundly rejected by Lord Hoffmann..”
- ❖ “..in the absence of any agreement between the parties, it would not be in accordance with the IR for the calculation of the net balance to be performed in what might be described as a piecemeal or hobbled fashion”

- ❖ Lonsdale (and Cannon) conceded that the claim [for the set-off account] could be brought for determination by court proceedings or in arbitration
- ❖ Coulson LJ thought that significant; but the concession was misunderstood (or possibly too wide)
- ❖ Why was adjudication different to arbitration / court proceedings?
- ❖ Answer: because
  - ✧ adjudication is only provisional and the determination of the account should not (per HHJ Coulson) be piecemeal
  - ✧ the contractual provisions disappear with the cause of action

“not without its problems..”

- ❖ “there can be no doubt that the language in Stein v Blake is not without its problems:.. in these appeals all counsel could find support for their diametrically opposed propositions within Lord Hoffmann’s speech”
- ❖ “..demonstrated beyond doubt that the proving of a claim of the kind with which this case is concerned is not a process which was extinguished by the occurrence of the liquidation.”
- ❖ **“liquidation set-off does not, in principle, preclude the determination of the underlying claims”**

# The (f)utility of adjudication in insolvency

- ❖ “I consider that there is a basic incompatibility between adjudication and the regime set out in the [Insolvency] Rules”
- ❖ “the former is a method of obtaining an improved cashflow quickly and cheaply”
- ❖ “the latter is an abstract accounting exercise, principally designed to assist the liquidators in recovering assets in order to pay a dividend to creditors”
- ❖ But, adjudication may determine only interim claims: a claim to an interim payment not subject to a pay less notice – that would not be part of the net balance calculation under the IR; merely a cashflow decision...

# No enforcement of adjudication

- ❖ What happens if an insolvent claimant in an adjudication is awarded a sum, but the responding party has a cross-claim?
- ❖ The insolvent party would be entitled to all of the sum in the adjudication award, but the responding party, if successful on the cross-claim, is entitled only to a dividend *pari passu* with other creditors
- ❖ As Chadwick LJ said in **Bouygues** ordinarily, summary judgment to enforce the adjudicator's decision will not be available
- ❖ The same reasoning by HHJ Purle in **Philpott** led to the Judge in that case granting a stay of the adjudication

So, where does that leave us?



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# Where does that really leave us?

- ❖ The adjudicator retains jurisdiction to hear the claim and cross-claim
- ❖ BUT..
  - ✧ An application to stay the adjudication will be granted save in exceptional circumstances
  - ✧ An application for summary judgment in respect of the adjudication award will not be granted save in exceptional circumstances

And..

- ❖ It would be a waste of a liquidator's assets to pursue an adjudication which is unlikely to be enforced
- ❖ An adjudication award will not even stand as a partial determination of the account between the parties
- ❖ The responding party should not have to incur costs in defending an adjudication where those costs may be irrecoverable
- ❖ The TCC is overburdened and shouldn't have to deal with futile enforcement proceedings

## Summary:

- ❖ “54. For all these reasons, I am in no doubt that the adjudication process on the one hand, and the insolvency regime on the other, are incompatible. 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. Thus, in the ordinary case, even though the adjudicator may technically have the necessary jurisdiction, it is not a jurisdiction which can lead to a meaningful result”

## The solution:

- ❖ “the solution to the incompatibility issue is the one that was adopted in the present case: the grant of an injunction to restrain the further continuation of the adjudication”
- ❖ “the court will grant such an injunction if the court concludes that the nascent adjudication is a futile exercise”

- ❖ General reservation of rights ..
  - ✧ (formerly acceptable *per* Ramsey J in **GPS Marine Contractors v Ringway Infrastructure Services** [201] EWHC 283 at [37-39])
- ❖ ..is undesirable, but may still be effective (unless you know of specific objections to jurisdiction);
- ❖ BUT, to defeat a plea of waiver
  - ✧ set out your objections to jurisdiction “appropriately and clearly”;
  - ✧ be specific about the jurisdictional challenge; and
  - ✧ don’t participate in the adjudication

- ❖ Facts of a CVA may be different to that of an insolvency
- ❖ (liquidators try to pay a dividend to creditors; administrators try to let the company trade out of difficulty)
- ❖ Adjudication may be "an extremely useful tool to permit the CVA to work"
- ❖ No stay of summary judgment in a CVA (but Court can take all relevant factors into account)

- ❖ Court of Appeal probably not right about the preservation of the causes of action upon insolvency
- ❖ CVA incorporating IR 14.25 should be no different conceptually
- ❖ An injunction will be granted to stay an adjudication if one party is insolvent
- ❖ Further analysis required on an application for a stay if the party is in a CVA
- ❖ Stay of enforcement still possible when a party is in a CVA but court will consider all circumstances (including those set out in **Wimbledon v Vago** [2005] EWHC 1086 per Coulson J)



Robert-Jan Temmink QC, FCI Arb  
[robert.temmink@quadrantchambers.com](mailto:robert.temmink@quadrantchambers.com)

Quadrant House  
10 Fleet Street, London EC4Y 1AU

Tel +44 (0)20 7583 4444  
Fax +44 (0)207583 4455  
DX 292 London Chancery Lane

[www.quadrantchambers.com](http://www.quadrantchambers.com)