

Adjudication Update: it's not just about Bresco

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Today's Agenda

- Adjudication in 2020
- *Bresco* & the insolvent Referring Party
- Crystallisation
- Severance
- Questions

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Adjudication in 2020

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A quick recap from our First Adjudication Update

- Getting the formalities right: Time does not run until the addressee receives or is deemed to receive the notice. (*Flexidig*)
- An adjudicator “may” be able to consider “without prejudice” letters, if the question of the admissibility of the letters was one of the central issues in the adjudication. (*Transform v Balfour Beatty*)
- A failure to a cross-claim or challenge with diligence may be a bar to a successful application for a stay of execution. (*Broseley v Prime Asset*)

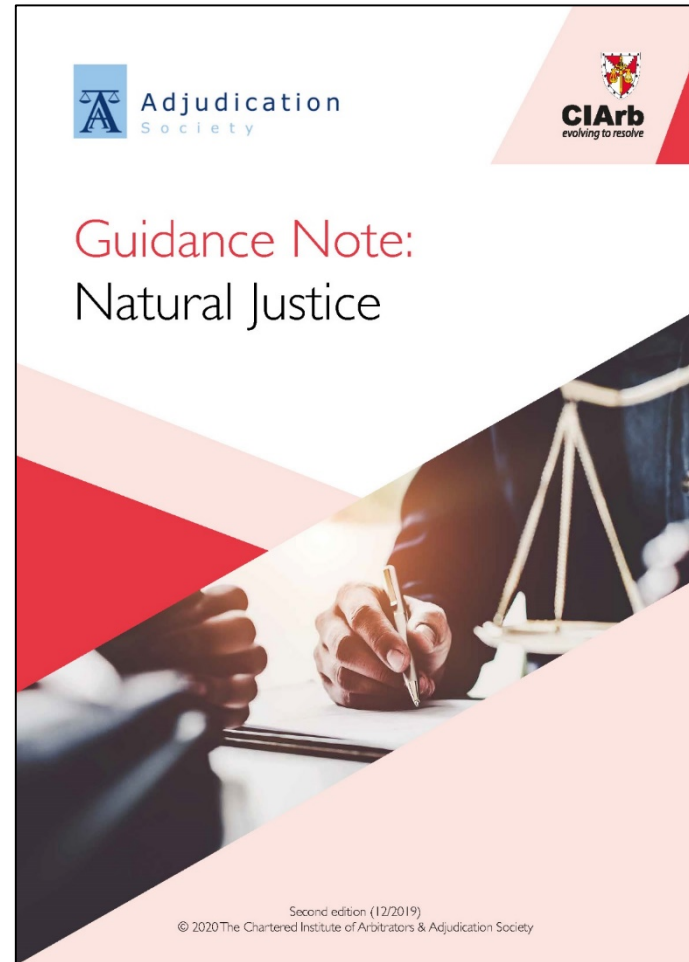
A quick recap from our First Adjudication Update

- Adjudication should, by and large, continue as usual, with the TCC as always, expecting parties to be sensible and take reasonable steps to ensure that adjudications can proceed in line with the lockdown measures that currently apply. (*MillChris*)
- Care should be taken to reserve your position when paying the adjudicator's fees, if you are going to dispute the adjudicator's decision. (*ISG v Platform*)
- If you bring Part 8 proceedings, they must raise a “*short and self-contained issue which arose in the adjudication*”. (*ISG v Platform**)

CI Arb: updated Guidance Notes

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<https://www.ciarb.org/resources/guidelines-ethics/adjudication/>



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“It was designed to be, and more importantly has proved to be, a mainstream dispute resolution mechanism in its own right, producing de facto final resolution of most of the disputes which are referred to an adjudicator. Furthermore the availability of adjudication as of right has meant that many disputes are speedily settled between the parties without even the need to invoke the adjudication process.”

Lord Briggs

“the provisions of the Scheme should be interpreted in such a way that they achieve its fundamental purpose, which is to enable contractors and subcontractors to obtain payment of sums to which they have been found due without undue delay. In particular, the intention is to avoid delay caused by lengthy dispute-resolution procedure.”

“the fundamental point is that the procedures used are intended to be simple, straightforward and immediately effective.”

Lord Drummond Young

Adjudication in 2020 and beyond

- British Institute of International and Comparative Law (BIICL), Concept Notes:

“there is a risk of a deluge of litigation and arbitration placing a strain on the system of international dispute resolution, and reducing the prospect of more constructive solutions and increasing the prospect of uncertainty of outcome.”

<https://www.biicl.org/breathing-space>

- TeCSA LVD Scheme / CIC Low Value Disputes Model Adjudication Procedure.

***Bresco Electrical Services Ltd (In
Liquidation) v Michael J Lonsdale
(Electrical) Ltd [2020] UKSC 25***

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*Bresco Electrical Services Ltd (In Liquidation) v
Michael J Lonsdale (Electrical) Ltd*
[2020] UKSC 25

- Judgment of the Supreme Court
- Landmark change in the law
- Why is it important?
 - Now an insolvent party can commence adjudication proceedings
 - Costs savings for insolvency practitioners
 - Current economic climate

Adjudication Society Report No. 18

| | | |
|--|-------------|------------|
| YEAR 16 – May 2013 – April 2014 | 1282 | -5% |
| YEAR 17 – May 2014 – April 2015 | 1439 | 12% |
| YEAR 18 – May 2015 – April 2016 | 1511 | 5% |
| YEAR 19 – May 2016 – April 2017 | 1533 | 1% |
| YEAR 20 – May 2017 – April 2018 | 1685 | 10% |
| YEAR 21 – May 2018 – April 2019 | 1905 | 13% |

TABLE 1: Adjudication appointments by Adjudicator Nominating Bodies (ANBs)

- Background
 - Bresco carried out works for Lonsdale on a project
 - A dispute arose in relation to the final account, there were claims, cross claims, allegations of wrongful termination
 - Bresco went into liquidation
 - Bresco's liquidators sought to refer the dispute to adjudication

*Michael J Lonsdale (Electrical) Ltd v
Bresco Electrical Services Ltd (In Liquidation)*
[2018] EWHC 2043 (TCC)

- First instance (TCC)
 - Lonsdale applied for an injunction to prevent the adjudication going ahead:
 - The issue: *“Whether a company in liquidation can refer a dispute to adjudication when that dispute includes determination of a claim for further sums said to be due to the referring party from the responding party”*
 - No longer a dispute under the contract
 - A decision would be *“incapable”* of being enforced
 - Injunction granted

*Bresco Electrical Services Ltd (In Liquidation) v
Michael J Lonsdale (Electrical) Ltd*
[2019] EWCA Civ 27

- Court of Appeal
 - Issues:
 - Whether an adjudicator can have jurisdiction where the claimant is insolvent
 - If yes, would the decision be enforced or would it be a futile exercise justifying an injunction?
 - There would be jurisdiction – the claim exists
 - Para 35:

“... technically the adjudicator would have the jurisdiction to consider the claim advanced by a company in liquidation...”
 - The decision would not be enforced

Court of Appeal (cont'd)

- An insolvent company would be unable to enforce an adjudicator's decision
- *“even though the adjudicator may technically have the necessary jurisdiction, it is not a jurisdiction which can lead to a meaningful result.”* [Para. 54]
- *“An exercise in futility”* [Para. 46]
- Appeal refused
- Bresco appealed again

Meadowside Building Developments (In Liquidation)
v 12-18 Hill Street Management Co Ltd
[2019] EWHC 2651 (TCC)

- Exceptions where an adjudication could take place
- The Meadowside exceptions:
- The adjudication determines the final net position between the parties
- Satisfactory security is provided
- Exceptions not met

Balfour Beatty Civil Engineering Ltd v Astec Projects Ltd (In Liquidation) [2020] EWHC 796 (TCC)

- Astec insolvent
- Balfour Beatty sought an injunction to restrain the adjudications
- Meadowside factors applied
- Two issues:
 - First, can a final net position be reached when there are three adjudications under three separate sub-contracts?
 - Yes
 - Second, should the adjudications proceed despite Astec being an insolvent company?
 - Yes. As Astec provided security through an insurer, and the adjudications determined the final net position between the parties under the three sub-contracts, the Meadowside exceptions were met. Therefore, the injunction was refused.

*Balfour Beatty Civil Engineering Ltd v Astec
Projects Ltd (In Liquidation) [2020] EWHC 796 (TCC)*

- Conditions:
 - Same adjudicator
 - Balfour Beatty had six months from the adjudicator's decisions to issue court proceedings to seek a different result
 - Astec would provide security of £750,000 and Balfour Beatty had the right to seek further security
- Rewording of Astec's insurance policy
- A high bar

Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25

- Supreme Court
- Bresco sought to lift the injunction and Lonsdale cross appealed seeking to restore the first instance decision ruling the adjudicator had no jurisdiction
- The cross appeal
 - Lonsdale argued the cross claim invoked Insolvency Rules and so no dispute to adjudicate
 - Supreme Court agreed with the Court of Appeal. There was still a dispute under the contract – it did not “melt away”. There was jurisdiction. Dismissed the cross appeal.
- Futility:
 - Futility – Would an adjudicator’s decision relating to a company in insolvency be incapable of being enforced? If not, was the adjudication procedure a futility?

Supreme Court (1)

- Adjudication was a valid form of ADR whether enforceable or not
- Unenforceability does not equal futility
- Para 67:

“The proper answer to all these issues about enforcement is that they can be dealt with, as Chadwick LJ suggested, at the enforcement stage, if there is one. In many cases the liquidator will not seek to enforce the adjudicator’s decision summarily. In others the liquidator may offer appropriate undertakings, such as to ring-fence any enforcement proceeds: see the discussion of undertakings in the Meadows case. Where there remains a real risk that the summary enforcement of an adjudication decision will deprive the respondent of its right to have recourse to the company’s claim as security (pro tanto) for its cross-claim, then the court will be astute to refuse summary judgment.”

- Para 71:

“Adjudication is not incompatible with the insolvency process. It is not an exercise in futility”

Supreme Court (2)

- Futility – para 59:

“.. the insolvent company has both a statutory and a contractual right to pursue adjudication as a means of achieving resolution of any dispute arising under a construction contract to which it is a party, even though that dispute relates to a claim which is affected by insolvency set-off. It follows that it would ordinarily be entirely inappropriate for the court to interfere with the exercise of that statutory and contractual right. Injunctive relief may restrain a threatened breach of contract but not, save very exceptionally, an attempt to enforce a contractual right, still less a statutory right.”

Supreme Court (3)

- Futility – para 64:

“Thus it is no answer to the utility (rather than futility) of construction adjudication in the context of insolvency set-off to say that the adjudicator’s decision is unlikely to be summarily enforceable. The reasons why summary enforcement will frequently be unavailable are set out in detail in Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2001] 1 All ER (Comm) 1041, paras 29-35 per Chadwick LJ. As he says, the court is well-placed to deal with those difficulties at the summary judgment stage, simply by refusing it in an appropriate case as a matter of discretion, or by granting it, but with a stay of execution. There is in those circumstances no need for an injunction, still less a need to prevent the adjudication from running its speedy course, as a potentially useful means of ADR in its own right.”

Appeal allowed

Enforceability

- Supreme Court recognised that enforceability might still be a problem
- The Meadowside exceptions – now critical
- Funding?

The future

- No more injunctions
- Floodgates/backlog?
- Recession
- Good news for insolvency practitioners
- Employer and main contractors can expect a notable upturn in adjudications by insolvent contractors and sub-contractors
- Enforcement stage will be key
- Liquidators who want enforceable decisions from adjudicators will need to be prepared to ring fence the proceeds of enforcement, and to provide security in respect of the costs of the adjudication award and any adverse costs order in the enforcement proceedings or subsequent litigation.

It's not all about Bresco...

The (short-lived) return of crystallisation



Melissa Shipley
Barrister, 39 Essex Chambers

*MW High Tech Projects UK Limited v Balfour Beatty
Kilpatrick Limited* [2020] EWHC 1413 (TCC)



- Notices of delay issued on 2 March 2018, 13 April 2018, 29 June 2018, 1 October 2018 and 27 February 2019. No response.
- 30 July 2019: Goodman Report served.
- 8 August 2019: Notice of adjudication. *“A dispute has arisen between the Parties in relation to BBKL's entitlement (as at 18 November 2018) to an extension to the period of completion for Section 3 of the Sub-Contract Works...”*
- Adjudicator awarded Balfour Beatty the full extension of time claimed.

*MW High Tech Projects UK Limited v Balfour Beatty
Kilpatrick Limited* [2020] EWHC 1413 (TCC)



- Had a dispute between the parties crystallised?
- MW argued it was entitled to 16 weeks to assess a claim under the contract- no dispute could crystallise until a reasonable time had elapsed for MW to consider the claim and either accept or reject it.

*MW High Tech Projects UK Limited v Balfour Beatty
Kilpatrick Limited [2020] EWHC 1413 (TCC)*



Clause 2.17.1

*“If and whenever it becomes reasonably apparent that the commencement, progress or completion of the Sub-Contract Works or such works in a Section is being or is likely to be delayed the Sub-Contractor **shall forthwith give notice to the Contractor of the material circumstances**, including, insofar as the Sub-Contractor is able, the cause or causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Sub-Contract Event”*

Clause 2.17.2

*“In respect of each event identified in the notice the Sub-Contractor shall, if practicable in such notice or otherwise in writing as soon as possible thereafter, give **particulars of its expected effects**, including an estimate of any expected delay in the completion of the Sub-Contract Works or such works in any Section beyond the relevant period or periods for completion stated in the Sub-Contract Particulars (Item 5) or any previously revised period or periods”*

*MW High Tech Projects UK Limited v Balfour Beatty
Kilpatrick Limited [2020] EWHC 1413 (TCC)*



Clause 2.17.3

“The Sub-Contractor shall forthwith notify the Contractor of any material change in the estimated delay or any other particulars and supply such further information as the Contractor may at any time reasonably require”

*MW High Tech Projects UK Limited v Balfour Beatty
Kilpatrick Limited [2020] EWHC 1413 (TCC)*



Clause 2.18.2

*“Whether or not an extension is given, the Contractor shall notify the Sub-Contractor of his decision in respect of any notice under clause 2.17 as soon as is reasonably practicable and in any event **within 16 weeks of receipt of the required particulars...**”*

*MW High Tech Projects UK Limited v Balfour Beatty
Kilpatrick Limited* [2020] EWHC 1413 (TCC)



- No new law.
- Jackson J's seven propositions in *Amec Civil Engineering Ltd v The Secretary of State for Transport* [2004] EWHC 2339 (TCC) at Paragraph 68.
- *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 82 at Paragraph 55: “One cannot say that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication or arbitration...”

*MW High Tech Projects UK Limited v Balfour Beatty
Kilpatrick Limited* [2020] EWHC 1413 (TCC)

- Question was whether the additional information, objectively assessed, gave rise to a new claim.
- Necessary to construe the provisions in a “*sensible and commercial way*” (Paragraph 53).
- Goodman Report did not amount to a fresh notification, whether under Clause 2.17.1, 2.17.2 or 2.17.3.
- “*It contained a detailed critical path analysis and the total extension of time claimed was marginally longer than the previous cumulative extension claimed but it was not materially different to the delay claim advanced in the earlier notices...*” (Paragraph 59).

*MW High Tech Projects UK Limited v Balfour Beatty
Kilpatrick Limited [2020] EWHC 1413 (TCC)*



*“60. The Goodman Report was **evidence by way of expert analysis to support BBK’s claim** for an extension of time to Section 3 of the works in respect of which there was a crystallised dispute.*

61. The dispute referred to adjudication was BBK’s disputed claim for an extension of time to Section 3 of its works. It follows that the adjudicator had jurisdiction to determine the dispute and the adjudication decision was valid”

Two key points

1. No new law.
2. Respond!

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Severance



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- Could the adjudicator’s decision on an extension of time and loss and expense be severed?
- *Willow Corp SARL v MTD Constructors* [2019] EWHC 1591 (TCC): was there a “*core nucleus*” of the decision that could be safely enforced?
- “...*the provisions of the Scheme should be interpreted in such a way that they achieve its fundamental purpose, which is to enable contractors and subcontractors to obtain payment of sums to which they have been found due without undue delay*” (Paragraph 25)

*“...In relation to an adjudicator’s award that is partially valid and partially invalid, the valid part should in our opinion be enforced if that is **realistically practicable**. That will depend on whether the valid and invalid parts of the award can be severed from each other, but in approaching severance we consider that the court should adopt a **practical and flexible approach** that seeks to enforce the valid parts of the decision **unless they are significantly tainted** by the adjudicator’s reasoning in relation to the invalid parts” (Paragraph 25)*

- Extension of time and associated loss and expense would not be enforced. Neither would the elements that flowed from the adjudicator's decision on these, e.g. liquidated damages.
- BUT all other aspects of the adjudicator's decision, e.g. payment for measured works and additional works, would be enforced.
- They were “...untainted by the decision and reasoning in relation to extension of time and loss and expense” (Paragraph 48).

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Adjudication in 2020



Crystal Ball Gazing

- If there are more disputes will there be more adjudications?
- If there are more adjudications, is now the time to open up the adjudicator nominating body lists so that they become more diverse?
- Has the time come to remove the power and other industry exemptions?
- Is that fair on residential owners too?

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Thank you.
Questions?

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Next week:

Fire Safety in Tall Buildings: the Technical and Legal Issues

Thursday, 23 July 2020

12pm (30mins + 10mins Q&A)



Jon Miller
Fenwick Elliott
Partner



Glenn Horton
H+H Fire
Director

Register at www.fenwickelliott.com/events