

BRESCO V LONSDALE - A GAME CHANGER FOR INSOLVENCY PRACTITIONERS

- The judgment in *Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited* recognised that insolvent parties have an unfettered right to adjudicate.
- In so doing the judgment opened the door for Insolvency Practitioners to use adjudication, or the threat of adjudication, to resolve disputes arising under construction contracts.

PRIOR TO BRESCO

Prior to the ground breaking judgment in Bresco, insolvent parties could adjudicate a construction contract dispute, but an adjudicator's decision was effectively worthless as it was extremely difficult to enforce that decision at Court. If an insolvent applicant tried to enforce an adjudicator's decision at Court, all the responding party had to do was to put forward a purported counterclaim or right of set off and it would be able to obtain an injunction against the insolvent applicant, restraining them from continuing with the enforcement.

This meant that adjudication as a means of dispute resolution (and recovery of sums owed to the insolvent party) had little to no value to Insolvency Practitioners; the only way a dispute could be formally resolved was by costly and lengthy litigation or arbitration.

BRESCO V LONSDALE: THE JUDGMENT

The parties had entered into a construction contract, but later a dispute arose as to whether one of the parties had wrongfully repudiated it. A variety of claims and cross-claims lay between them.

Bresco subsequently entered into creditors' voluntary liquidation in 2015 and, three years later, the Liquidator commenced an adjudication for £220,000, alleging wrongful repudiation. Lonsdale disputed that the adjudicator had jurisdiction to determine the dispute as Bresco was in liquidation and issued injunctive proceedings restraining Bresco from proceeding.

The matter ultimately came before the Supreme Court in 2020 (and so cannot be appealed). The Judge, Lord Briggs, held that adjudication is an important dispute resolution mechanism and can result in a cost effective and final resolution of construction disputes, albeit that a liquidator will need to offer appropriate undertakings and to ring-fence any enforcement proceeds so as to mitigate against any risks.

HOW INSOLVENCY PRACTITIONERS CAN USE BRESCO TO THEIR ADVANTAGE

Whereas previously adjudication was a hollow threat, an Insolvency Practitioner now has some leverage in a negotiation over construction disputes, and counterparties may have to deal with claims to avoid the risk of an adjudication being commenced. The costs of dealing with an adjudication will likely need to be balanced, by both sides, against the alternative commercial outcome of agreeing a consensual resolution.

Andy Bates, partner in the Restructuring Team at Addleshaw Goddard, comments "*Insolvency Practitioners should make debtors aware that they are familiar with the Bresco case and understand its significance for construction disputes. Debtors may have to consider instructing lawyers once adjudication is threatened and our experience is that nothing brings debtors to the table more quickly than the prospect of incurring (potentially significant) legal fees.*"

WHO TO CONTACT



ANDY BATES

Partner

+44 (0) 113 209 2468

+44 (0) 7738 143 076

Andrew.Bates@addleshawgoddard.com