Case No: HT-2024-LIV-000015

[2024] EWHC 2890 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

35 Vernon Street
Liverpool
L2 2BX

Date: 22nd October 2024

Before:

DISTRICT JUDGE BALDWIN

- -

Between:

MALIN INDUSTRIAL CONCRETE FLOORS LIMITED (in Administration)	**Claimant**
-and-	
VOLKERFITZPATRICK LIMITED	**Defendant**

- -
- -

Mr Douglas James (instructed by **Spencer West LLP**)
for the **Claimant**
Mr Luke Wygas (instructed by **Archor LLP**)
for the **Defendant**

Hearing date: 9th October 2024

Judgment (Approved)

Introduction – Claimant's application to enforce an adjudication decision

1. The Claimant applies by way of a summary judgment application dated 8th July 2024, within Part 7 bespoke proceedings, to enforce the construction adjudication decision of David Latham dated 11th April 2024 ("the decision"), wherein he decided that the Defendant should pay the Claimant the sum of £59,950 plus interest and VAT together with his fee. The application is supported by the witness statements of Gregory Roy McMahon dated 9th July 2024 and 28th August 2024, with exhibits. The application is opposed by the Defendant, relying upon the witness statement of Oliver Worth dated 15th August 2024, with exhibits.

2. By Order of 29th July 2024, Waksman J transferred the claim to Liverpool certifying that the application is suitable for hearing by a TCC District Judge.

3. I have been supplied with a hearing bundle and an authorities bundle and I shall refer to the hearing bundle pdf pagination thus [x]. Any below extracts from the decision are included verbatim, inclusive of any typographical errors in that document. Counsel each supplied a skeleton argument which they supplemented orally during the remote hearing by Teams.

4. The Defendant's opposition to enforcement was initially twofold, namely:-

    (i) Jurisdictional / breach of natural justice arising out of the adjudicator's decisions as to contractual due dates and final dates for payment; and

    (ii) In the context of an averred substantial cross-claim against the Claimant, in that the Claimant is insolvent (in administration), insufficient guarantees are said to have been offered to protect the Defendant either in terms of a lack of ongoing value in the Claimant's warranties as to workmanship or in terms of any recovery in subsequent proceedings, by way of damages and/or costs.

5. However, by way of concession in his skeleton argument, Mr Wygas narrowed the issues by abandoning the natural justice argument, leaving the second issue as the sole one for my determination.

Background and extracts from the adjudication

6. The contract in question is a sub-contract ("the contract") between the Defendant as employer and the Claimant as contractor for concrete flooring works in Doncaster, the contract dating from 12th April 2022. The works were completed and the final account was agreed. The principal sum in issue represents the final retention, as still held by the Defendant at the time when the Claimant went into administration. The Defendant denied that this sum was due to the Claimant and the parties agreed to adjudication as provided for in the contract and in accordance with the 1996 Act and the Scheme thereunder.

7. At paragraph 20 [24], the adjudicator set out the issues for his determination:-

> "20. In the submissions I have received it is apparent there is a dispute between the parties as to the following matters which fall to be decided in my determination of this dispute:
>
> 20.1. Is payment of the retention due;
>
> 20.2. Net final position between the Parties under the Sub-Contract;
>
> 20.3. Amount to be paid to Malin;
>
> 20.4. Amount to be paid to Malin in interest;
>
> 20.5. Liability for payment of my fee."

8. In relation to paragraph 20.2, the decision as to "net final position" included some consideration of the Defendant's (VFL's) position as to the existence of a counterclaim or cross-claim to be set off against the retention sum. Specifically, at paragraphs 51 – 56 [30 – 32], the adjudicator said this:-

> "*VFL's counter claims*
>
> 51. VFL alleged it has suffered losses as a result of Malin's insolvency including the cost or[1] insurance backed warranties to replace the collateral warranties provided by Malin and also the cost of repairing cracks to the slabs. VFL alleges it undertook repairs to the slabs after July 2023 and incurred cost which VFL estimated at approximately £50,000.00. Further inspections of the slabs are arranged for later this year which may reveal the requirement for further remedial work. VFL alleged that even if payment was procedurally due and clause 4.8C was not included in the Sub-Contract there would still be no sum due to Malin due to VFL's counter claims.

[1] This likely should be "of"

52. VFL claimed that detail of these works is outside the scope of this adjudication. VFL reserved its position in relation to its claims arising out of the insolvency of Malin. VFL alleged that the issues within the adjudication relate to the sums owed 'under the Contract' and the 'net position under the Contract' and that this does not affect VFL's claims for damages arising out of breach of the Sub-Contract by Malin.

53. Malin claimed that VFL has failed entirely to substantiate the purported claims. Malin alleged that the counter claims relied on by Malin are within the scope of this adjudication as I have been requested to decide the net final position between the parties. Malin alleged that VFL had the burden of proof in relation to its counter claims. As VFL did not provide any evidence in support of its counter claims then Malin claimed I should decide that VFL has not suffered any loss.

54. **I decide** that VFL's claim for set off against its alleged counter claims fails and does not entitle VFL to withhold payment of retention due to Malin. The reason for my decision is that VFL has not provided any detail or evidence in support of its counter claims and has not established that any defects existed at the Retention Release Date or that there is any amount which VFL is entitled to set off against the amount due under the Sub-Contract.

Net final position between the Parties under the Sub-Contract

55. It is agreed that the Final Sub-Contract Sum was agreed in a formal agreement dated 4 November 2022 in the sum of £3,970,000.00. It was further agreed that the outstanding payment against the above sum was retention held by VFL in the sum of £59,550.00.

56. **I decide** that the net final position between the Parties is largely undisputed in that both Parties accept that the Final Sub-Contract Sum was agreed in the gross value of £3,970,000.00 and that this amount has been paid other than for retention of £59,550.00 which is the subject of my decision. VFL has failed to provide any detail or evidence in support of its alleged counter claims therefore they do not affect the net final position under the Sub-Contract."

and at paragraph 64.2 [33]:-

"64.2. The net final position between the Parties is that VFL owes Malin the sum of £59,550.00 plus VAT as applicable;"

The Claimant's arguments

9. It is important to note that the Claimant is not seeking a forthwith enforcement order. In essence the Claimant contends that it is an appropriate exercise of the Court's discretion to grant enforcement by way of summary judgment, despite the insolvent state of the Claimant, but then also to acknowledge the potential for that indebtedness to be off-set or extinguished by sums which might be found to be due by way of cross-claim, by staying enforcement of the judgment sum for a period of say 3 months, to allow the Defendant to bring a Part 7 claim for such sums. Should such a claim materialise, I do not understand that there would be any objection to such a stay on enforcement being extended thereafter to abide the event.

10. Mr James argues, essentially, that the Defendant has engaged in tactics to subvert the purpose of adjudication by lightly trailing a cross-claim, without properly engaging in the issues within the adjudication, thereafter to be able to prevent enforcement in an insolvency situation by reviving such issues as remaining unresolved, nevertheless set against the underlying position as stated by Mr Worth at paragraph 16 of his statement [82],

> "16. I have not been instructed to pursue the cross-claim on VFL's behalf, and I am instructed that VFL have not otherwise pursued it (other than to note its existence as above). This is because Malin is in insolvent administration and VFL therefore considers that are no realistic prospects of recovering funds from Malin. It has therefore taken the commercial decision not to pursue the matter, which is in my experience not uncommon in construction insolvency situations such as this."

11. Mr James acknowledges that a careful consideration of the authorities is required, whilst flagging up that this is an administration case and not a liquidation case, such that the mandatory statutory insolvency set off (the obligation on insolvency to take into account what is due from each party to the other) is, he suggests, not clearly applicable at this stage of the Claimant's insolvency process.

12. He invokes the obiter remarks of Lord Briggs in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, in particular at paragraphs 64 – 67, as the starting point. The context was an appeal in relation to an application for an injunction to restrain the adjudication process where there was an asserted cross-claim, said to give rise to futility in conducting the adjudication process. At paragraph 64, Lord Briggs affirms Chadwick LJ's judgment in *Bouygues v Dahl-Jensen* [2001] 1 All ER (Comm) 1041 at paras 29-35, namely that the Court is well-placed to deal with difficulties encountered in the context of insolvency set-off, either by refusing summary judgment or granting it subject to a stay of execution, the latter as contended for here.

13. At paragraph 65, Lord Briggs says this,

> "…if the cross-claim can be determined by the adjudicator, because the claim and cross-claim form part of the same "dispute" under the contract, the adjudicator may be able to determine the net balance. If that is in favour of the company, there is again no reason arising merely from the existence of cross-claims why it should not be summarily enforced."

14. Then, at paragraph 66,

> "True it is that the adjudicator may over-value the net balance in favour of the company, so that summary enforcement may leave the respondent to the reference having first to establish a true balance in its favour and then to pursue it by proof (or possibly as a liquidation expense) against an under-funded liquidation estate. But over-valuation is a problem that may arise in any liquidation context, even where there is no cross-claim. There is no suggestion that, absent insolvency set-off, adjudication is ordinarily futile merely because the company making the reference is in liquidation or distributing administration."

15. Finally, at paragraph 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 *Meadowside* 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.

16. What happened in this adjudication, however, argues the Claimant, is that the Defendant chose to trail, but not engage evidentially in the cross-claim option of arriving at a net balance. This is said to give rise to an impression that the cross-claim lacks substance. In that regard, the Claimant notes the approach of Peter Prescott QC in *Swissport (UK) Ltd v Aer Lingus Ltd* [2007] EWHC 1089 (Ch) at paragraph 51 when considering the approach to a cross-claim in an insolvent company situation,

> "…I would reject the submission that, once any sort of cross-claim is shown to be barely arguable, it must be estimated at face value and then set off for summary judgment purposes against an undoubted claim on which summary judgment would otherwise be available."

17. Mr James points out that the Defendant already had in its possession a "Floor Cracking Inspection Report" of Face Consultants Ltd [39ff] dated 24th November 2023 prior to the adjudication referral in March 2024, which identifies floor cracking and possible contributory factors to this, without actually asserting a likelihood of fault on the part of the Claimant. The failure to use this as a shield in the adjudication is indicative, he argues, of the lack of substance in the cross-claim and the tactical usage to block enforcement.

18. The Claimant then moves to examining the post-*Bresco* case of *John Doyle Construction Ltd v Erith Contractors Ltd* [2021] EWCA Civ 1452 and the observations of Coulson LJ, the relevant issue described thus at paragraph 2,

> "…lurking in the shadows of this appeal is a wider point, as to whether a company in liquidation, with an adjudication decision on its final account claim in its favour, but facing a continuing set-off and counterclaim, is entitled to summary judgment at all. That issue in part turns on a consideration of the decision of the Supreme Court in *Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited* [2020] UKSC 25; [2021] 1 All ER 697 ("*Bresco*"). There, the Supreme Court made it clear that a company in liquidation was entitled to commence and pursue an adjudication, and that to do so was not a futile exercise. But the appellant suggests that the Supreme Court went further and decided that a company in liquidation was entitled to summary judgment to enforce the decision of an adjudicator, regardless of the absence of a final determination of the other side's set-off and cross-claim. That is a potentially important issue in the inter-related worlds of construction law, insolvency and adjudication. Whilst I accept that, if the appeal fails on the three stated grounds, whatever I say on the summary judgment issue is *obiter,* it would, I think, be unhelpful for practitioners in those worlds to duck the point altogether."

19. At section 9 of his judgment, Coulson LJ posed the question at paragraph 82,

> "Is a company in liquidation entitled to enter judgment on its claim arising out of an adjudicator's decision, without regard to the paying party's set-off and counterclaim?"

20. In considering Lord Briggs' observations at paragraphs 64 – 67 of *Bresco*, Coulson LJ remarks at paragraph 87,

> "As Lord Briggs explained, there are many reasons why the ability to commence an adjudication is a useful commercial weapon, irrespective of whether a decision at the end is capable in law of summary enforcement. He was therefore only tangentially concerned with possible enforcement. Even then, Lord Briggs had very much in mind that any enforcement

would not be for the claim, but for the net balance after taking into account set-off: see [29]."

21. Thereafter, Mr James criticises Coulson LJ's approach to Lord Briggs' third example of where summary judgment might be inappropriate at paragraph 65 of *Bresco*, namely where the adjudicator has been able to determine the net balance when the claim and cross-claim form part of the same "dispute" under the contract. Coulson LJ had difficulty, at paragraph 90 of *Doyle*, with the concept of enforcing, by way of summary judgment, what would be a purely provisional decision by the adjudicator on the net balance.

22. As such, where Coulson LJ says this at paragraph 91,

> "Taking it in the round, I do not believe that Lord Briggs was saying in his *obiter* observations about enforcement that a company in liquidation was entitled to enter judgment (let alone recover the monies that were the subject of that judgment) on the basis of a provisional decision, in circumstances where there was a continuing set-off and cross-claim."

Mr James, no doubt with all due respect, says that Coulson LJ's "belief" is not to the point, but rather what Lord Briggs actually said.

23. Coulson LJ continues at paragraphs 100 – 101,

> " …As I have said, I do not accept … that the threat of summary enforcement is required to make adjudication work in every case, particularly where the claimant is insolvent and the threat would operate to the detriment of the solvent party … Such a principle is contrary to insolvency law. It is certainly not articulated in *Bresco*.
>
> 101. It might be said that this is an unsatisfactory result because it allows a defendant … to take advantage of … insolvency to avoid paying what they owe. That may, however, be the consequence of the insolvency regime prevailing. But it also wrongly assumes that the only weapon available … is summary judgment. That is not so, particularly in circumstances where … (h)aving commenced enforcement proceedings, an insolvent claimant can then get the defendant to "put up or shut up". It can make the same (larger) claim that it made in the adjudication, even if it makes plain that it would accept the adjudicator's lower figures (thereby putting the defendant at the risk of paying indemnity costs from the outset). It may be possible for the claimant to demonstrate an entitlement to an interim payment under CPR Part 25. The fact that the adjudicator has apparently considered the claims and found in the claimant's favour will put the defendant on the back foot throughout. Robust case management would lead to an efficient resolution of the remaining areas of dispute. …"

24. This approach, says Mr James, is entirely in opposition to that advocated by Lord Briggs in *Bresco*, in particular at paragraph 66, the *Bresco* approach being to place the onus on the Defendant to establish a true balance in its favour by way of a Part 7 claim, rather than placing the onus on the Claimant to bring its own Part 7 claim outwith the summary judgment enforcement route.

25. Mr James then concludes by drawing upon the approach which HHJ Kramer would have adopted on enforcement, but for the failure of the enforcement application on the grounds of natural justice, in *JA Ball Ltd (in administration) v St Philips Homes (Courthaulds) Ltd* [2022] EWHC 3690 (TCC), noting that this was an administration and not a liquidation case. After a careful review of the authorities from paragraphs 48 to 55, the judge draws, at paragraph 52, on the principles laid down by Edwards-Stewart J in *Straw Realisations (No.1) Ltd v Shaftsbury House (Developments) Ltd* [2010] EWHC 2597, subject to the following modifications expressed at paragraph 53,

> "*Straw* pre-dated *Bresco* and *Doyle*. I propose to adopt the principles set in *Straw* with the modifications that:
>
> a. It is clear from *Bresco* and *Doyle* that even in the case of a liquidation, refusal of summary judgment is not inevitable as there may be circumstances, such as those identified by Lord Briggs at [65]. Accordingly, the decision in such cases is fact specific.
>
> b. As the decision has to be fact specific, the same must be said of an award in favour of a company which subsequently goes into administration. There is no hard and fast rule that an award will not be enforced in favour of a company in administration. For example, if the evidence is that the administration will save the business such that it can trade out of insolvency or that the company has become insolvent due to the non-payment of the award, these may be powerful reasons for giving judgment without staying enforcement; as happened in the analogous case concerning the impact of a CVA, heard together with *Bresco* in the Court of Appeal, *Cannon Corporate Limited v Primus Build Limited* [2019] EWCA Civ 27. If, on the other hand, the defendant is disabled in pursuing its cross-claim by the administration, that would be a good reason for refusing judgment to allow the insolvency regime, which affects all creditors, to take primacy over that of adjudication, the affect of which is limited to the parties. Further, if the financial state of the claimant, which led to the insolvency would result in there being no prospect that it could repay the award if the cross-claim were successful, that would be a good reason to stay enforcement, or where notice under IR 14.29 had been given, refuse judgment following *Bouygues*, *Bresco* and *Doyle*."

26. In concluding, at paragraph 61, after finding on the facts that the claimant was highly insolvent, the judge says,

> "It is clear beyond doubt that (the claimant) could not repay the award in circumstances where (the defendant) succeeds on its cross-claim. *Bouygues*, *Bresco* and *Doyle*, establish that the robust approach to the enforcement of adjudication awards must give way to the insolvency regimes when there is a tension between the two. They identify two ways in which this can arise. First, in the case where the parties' rights are converted by the insolvency regime into a statutory set off, there should be no enforcement unless, on the facts, it is clear that there is a positive balance owing to the claimant. Second, where the effect of insolvency is that enforcement of the award would lead to the payee losing its security for a cross-claim there should be no, or a stay on, enforcement, unless the court is satisfied that there is some worthwhile and suitable safeguard in place to ameliorate that hardship."

27. The judge continues,

> "67. It is difficult to find a clear guide from the cases as to the principles governing a refusal of judgment as opposed to stay, where the only harm to the defendant is the loss of the security for its cross-claim. In liquidation cases, it has been said that there should be no judgment due to the conversion of the parties' rights into the statutory set off, *Bouygues* [35] and *Doyle* at [144]-[145], unless there is no realistic defence of set-off to the whole or part of the claim; *Bresco* [65], but, as is clear from *Bresco* this approach is fact sensitive. There may be other reasons for refusing judgment, such as where it is realistically arguable that the nature of the funding agreement gives rise to an abuse of process, as in *Meadowside*.
>
> 68. If the only issue was the loss of security, subject to my conclusion as to the worth of the Pythagoras guarantee and the utility of ring-fencing, I would have given judgment on the award but imposed a stay for a limited period, say 6 months, subject to extension, to enable the defendant to bring its claim. This would recognise the purpose of the adjudication regime, at least in part, but put the onus on the defendant to argue later or, in default of argument, pay. To do otherwise would render the adjudication pointless as it would enable the defendant to walk away and trust that the administrators of this highly insolvent company would give up the chase. It would be wrong for insolvency law to encourage a result which may be to the prejudice of innocent creditors and could encourage debtors to delay payments if the creditor's insolvency was on the horizon, as was recognised by the court in *Swissport (UK) Ltd (in liq) v Aer Lingus Ltd* [2009] BCC 113 at [33]."

and ultimately,

> "87. The award will not be enforced as the adjudicator failed to comply with
> the rules of natural justice in coming to his award. Had this not been the case, I would have given judgment but stayed enforcement for 6 months,
> or until further order, to enable St Philips to bring its cross-claim."

28. Thus, says Mr James, to do anything different from that advocated by the Claimant in this case would be to encourage the deliberate refusal to pay a properly due retention sue with the aim of being in a better position of avoiding paying altogether upon the insolvency of the contractor. Loss of security for the cross-claim is accordingly argued on these facts to be no bar to entering summary judgment, subject to a stay upon enforcement of the type advocated, neither should the Defendant be allowed to utilise the trailed but insubstantial cross-claim forever, even taking into account the further ADS "Internal Concrete Condition Survey" of May 2024 [169 – 178], in order to render the adjudication otiose.

The Defendant's arguments

29. Mr Wygas first addresses the cross-claim and inadequacy of any security from the Claimant for such.

30. He submits that there is clear evidence of a cross-claim for defective flooring, upon which £66,000 has already been spent, not including interest, supervision and administration costs and the value of loss warranties, thus clearly over-topping the claim. The cross-claim, however, does not have to be proved, but rather has to satisfy the *Swissport* test of being more than shadowy or barely arguable. The Court is urged to find a strong cross-claim here, on the basis of substantial spending on repair works effectively speaking for itself in terms of the Claimant being "the floor people".

31. In terms of security, Mr Wygas argues that this has to extend to security for the Defendant's costs of the cross-claim, not just for the sum claimed itself, as identified by Adam Constable QC (as he then was) in *Meadowside Building Developments Ltd v 12-18 Hill Street Management Company Ltd* [2019] EWHC 2651 (TCC) at paragraph 74.

32. Mr Wygas then moves to the relevance of the absence of the Claimant giving any security for the Defendant's costs of bringing its cross-claim. He emphasises that, in particular by paragraph 42 of Mr James' skeleton argument, the Claimant seeks to maintain that HHJ Kramer in *JA Ball*, despite finding that security was inadequate for the cross-claim, to include the costs of the cross-claim and, indeed, the costs of opposing an unsuccessful

enforcement application, nevertheless found that it would be appropriate to enforce the adjudication order, subject to a 6 months stay of execution. He asks me to note *JA Ball* paragraphs 57 and 58, including Adam Constable QC's test of "a high level of certainty" that the guarantor would be good for the money and then paragraphs 74 – 78, where the judge appeared to conclude on inadequacy,

> "Stepping back, on the selective evidence produced … , I am not satisfied that there is a high level of certainty, which was the test applied in *Meadowside* at [136]-[137], that the company will be able to meet the first £150,000 of costs so as to trigger the Aviva guarantee.".

Thus, says Mr Wygas, insofar as the relied upon final conclusion at paragraph 87 of *JA Ball* is said by the Claimant to convey the judge's decision that the inadequacy of comprehensive security would not have led to the decision not being enforced (subject to a limited stay), but for the natural justice point in any event, that is either a wrong interpretation or the judge's ultimate approach was simply wrong.

33. Mr Wygas' next point is that this case does not fit into Lord Briggs' exception at paragraph 65 of *Bresco* in any event. His main point, here, it seems to me, is that the extent of the question answered by the adjudicator was a determination of "the net position under the contract", as emphasised by Mr Worth in his email in his email of 8th April 2024 [246]. This issue, it is argued, is distinct and separate from determining the "net balance" after taking into account the cross-claim. Insofar as he was purporting to decide the net balance, that, would accordingly be outside of the adjudicator's jurisdiction.

34. As such, Mr Wygas says that this is precisely a *Doyle* situation (see paragraph 94 of Coulson LJ's judgment), there has been no adjudication on the net balance, and the insolvency set-off should apply to disentitle judgment on a sum only provisionally found due under the contract by the adjudicator. He rejects as unlikely that Coulson LJ "got it wrong", as the simple point is that insolvency must trump adjudication and the issues of fact on the cross-claim still fall to be decided. As to whether a lack of security for the Defendant's costs of its cross-claim would be a permanent barrier to the cross-claim being argued, he suggested to me that the appropriate course would be for the Claimant to bring a Part 7 claim and then for the Defendant to apply formally within those proceedings for security for its costs. For what it is worth, at this stage, that seems to me to be a problematic proposition, given that formal applications for security for costs are limited by r. 25.12 to Defendants to a claim, including a counterclaim and whilst the Defendant might be successful in relation to seeking security for its costs of defending a Part 7 claim brought by the Claimant, the same would not necessarily apply insofar as the costs of pursuing the counterclaim are concerned.

Discussion

(a) A cross-claim of sufficient substance?

35. I have, in effect been presented with the above two reports[2] together with a separate letter dated 4th October 2024 from the Defendant's solicitors to the Claimant's solicitors asserting that in excess of £65,000 has now been spent on remedial works. I accept from Mr James, not understanding it really to be in issue, that there should be evidence of more than a bare cross-claim for the Defendant's objection to enforcement to be considered further. Whilst neither report in so many words gives a specific opinion that there are or were defects in the flooring which are likely to be as a result of any default on the part of the Claimant, it does seem to me that the Face Consultants Report raises the following points of substance:-

- Cracks and crack repairs are clearly identified
- The cracks are likely non-structural, restrained drying shrinkage cracks
- These occur in circumstances of "high restraint stresses" (para. 3.6 [46]) during drying shrinkage
- Possible causes include those seemingly attributable to the Claimant's workmanship, namely poorly prepared uneven sub-base; poor isolation around fixed objects, e.g. columns; poorly constructed day joints not opening as intended; late or insufficiently deep saw cutting.

36. It is not clear to me whether the ADS report is surveying the same or a different floor as the descriptions of the locus are not identical, but it seems to me that the conclusions at section 5 [178] include the potential for a "wide crack" referred to therein to be as a result of a departure from design specifications.

37. In my judgment, whilst I reject any submission from the Defendant that the thing obviously speaks for itself and the cross-claim should be regarded as strong simply because funds have been spent repairing cracks (there may be causes unrelated to the workmanship, e.g. significant early loading and Thermal Seasonal Movement [46-47] and adherence to the design as to the placement of steel reinforcement near the bottom or base of the slab [178]), there is sufficient evidence to raise the substance of the potential cross-claim from merely bare to real (as opposed to fanciful), to use terminology familiar to those engaged, for example, in setting aside default judgment applications.

38. Accordingly, I find on the facts before me that there is a sufficient potential for a cross-claim for the Defendant's objections to enforcement to be considered further, in the context of insolvency.

(b) Already decided by the adjudicator?

[2] See paras 17 and 28

39. Having considered each side's documentation as supplied to the adjudicator in advance of his decision [216 – 246], it is apparent that the Defendant wished to reserve its position on a cross-claim, whereas the Claimant wished the fact that it had been "trailed" to cause it to be determined by the adjudicator in reaching his decision as to the net final position under the contract. I find that the wording used by the adjudicator at paragraph 56 of the decision is instructive. It is noteworthy that he is of the view that this issue is largely undisputed between the parties, which is in accordance with his straightforward analysis thereafter that the agreed gross value of the contract had been paid, save for the retention with which he was concerned. In that he further finds that the lack of evidence adduced on any cross-claim does "not affect the net final position", I am not persuaded that the adjudicator was in fact carrying out the type of exercise envisaged by Lord Briggs at paragraph 65 of *Bresco* as a determination of the *net balance* (my emphasis) arising out of the same dispute. Lord Briggs, I suggest, must have had in mind some sort of adjudication on the merits of a cross-claim, as foreshadowed at paragraph 49,

> "Now suppose that there is a disputed cross-claim under the same contract for £100,000. Again, this dispute would be entirely a dispute or disputes under the contract, and the cross-claim would be available by way of insolvency set-off, as a defence to one third of the company's claim. Using Akenhead J's rule of thumb, there would still be a single dispute under the contract. Finally, suppose that the cross-claim is alleged to overtop the company's claim (as here). It would still be available as a defence to the company's claim, now to the whole of it, and form part of the same dispute. The only constraint upon the adjudicator's jurisdiction would be that he could not award the balance to the creditor, but he could dismiss the claim
> and even make a declaration as to the value of the cross-claim, as part of his reasons why the company's claim wholly failed…"

The concept of concluding that a cross-claim of declared value can lead the adjudicator to dismiss the claim must, in my view, pre-suppose that the "net balance" exercise is only engaged when more than mere "trailing" is involved evidentially. As HHJ Kramer relevantly puts it at paragraph 61 of *JA Bell*,

> "there should be no enforcement unless, on the facts, it is clear that there is a positive balance owing to the claimant."

40. I therefore conclude, whether or not there is some controversy as to what Lord Briggs was meaning overall, as considered by Coulson LJ in *Doyle*, that the adjudicator in the decision in this case was not deciding the net balance between the parties after consideration of any cross-claim and therefore that that potential circumstance for summary enforcement without more falls away in any event.

(c) The approach to summary enforcement and the insolvency of the Claimant

41. Unlike HHJ Kramer in *JA Ball*, I am supplied with scant evidence as to the level or extent of the insolvency of the Claimant. The Claimant is in administration and not in liquidation and may or may not be rescued going forward. The spectre of insolvency statutory set-off perhaps looms, but the Claimant, it seems to me, is rather in the position of the company in *Straw Realisations* and, as such, the Defendant in this case is no longer in the standard "pay now, argue later" position which would apply as a matter of course to an unimpeachable decision in favour of a solvent Claimant.

42. The Defendant's position here is that there should be no enforcement because of the administration combined with the fact that no security is offered either for the claim itself or for the costs of any cross-claim, any requirement to pay over the retention meaning an immediate loss of any benefit of security there.

43. Doing the best I can, I find it appropriate to infer from the lack of offer of any security and the lack of evidence in support of any contention that the Claimant is not significantly insolvent, that there is likely to be a sufficient level of insolvency here, such that there is a real risk that unfettered summary enforcement will deprive the Defendant of recourse to the retention monies as security for any cross-claim.

44. There seems little doubt that the starting point is that enforcement of adjudication awards must give way to the strictures of the insolvency regime where there is a tension between the two, see *JA Ball* paragraph 61. There is, in my view, prior to any Notice of Distribution, prima facie no crystallisation of the statutory insolvency set off. There is here no offer of security, either for the cross-claim or the costs of the same and I am satisfied, on my conclusion as to the level of insolvency here, that there is a real risk of loss of security for at least part of the cross-claim should the award be required to be paid over without more.

45. In all the circumstances, in my view, there should not be a complete bar to enforcement, but consideration should be given to imposing a stay, being mindful of the *Wimbledon v Vago* principles. Insofar as it is contended by the Claimant that a proper reading of HHJ Kramer's judgment should encourage me to limit the stay to 6 months "to enable the Defendant to bring its claim", I am unpersuaded that that is a proper reading of that decision. I agree with Mr Wygas that such a conclusion ignores the negative consideration by the judge of the value of the guarantees on offer, which also went to the issue of security for the costs of bringing the cross-claim, which, to my mind, when coupled with his use of the phrase "subject to my conclusion as to" the same at paragraph 68, adds a gloss to his overall conclusion. There is no sensible reading of that conclusion, in my view, other than that the judge was saying that, but for the natural justice issue, as long as sufficient guarantees were in

place for the value of the cross-claim and the costs of pursuing the same, then a 6 month stay would have been imposed to allow the Defendant to put up or shut up.

46. Whether my analysis above is right or wrong, however, my ultimate conclusion should be based upon the facts before me and a proper exercise of my discretion in consequence. I am concerned that no encouragement should be given to any party to attempt to use insolvency tactically as a shield to avoid proper payment of an adjudicator's award. If a statutory set off crystallises, then little more can be done, as the insolvency regime, I am satisfied, will trump enforcement in those circumstances. However, as an alternative and in the absence of such a set off intervening, as I have already observed, the evidence in support of the counterclaim, although raising it from a bare level to one with a real prospect, still fails to assert a prima facie *likelihood* (my emphasis) that the damage complained of was caused by postulated potential failings of the Claimant as opposed to extraneous factors or the default of others. In my view, given the underlying "pay now, argue later" purpose of this regime as a whole, there should be a further requirement imposed upon the Defendant in order to avoid enforcement in these particular circumstances.

47. My determination, therefore, is that summary judgment will be granted, but stayed pending further order, with permission to the Claimant to apply to lift the stay unless satisfied by the Defendant within 3 months of the date of the Order that there is a prima facie evidenced case supportive of a likelihood of establishing a sufficient degree of liability on the part of the Claimant giving rise to a cross-claim for a level of damages with the potential of extinguishing the amount awarded by the decision. Should such evidence only support a partial offsetting, I would expect the parties to reach terms on the appropriate level of enforcement, short of the total sums sought herein.
