Neutral Citation Number: [2021] EWCA Civ 1452

Case No: A1/2020/1858

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
(TECHNOLOGY AND CONSTRUCTION COURT)
Mr Justice Fraser
[2020] EWHC 2451 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE COULSON
and
LORD JUSTICE EDIS

- -

Between :

John Doyle Construction Limited (In Liquidation)	**Appellant**
- and -	
Erith Contractors Limited	**Respondent**

- -
- -

Adam Constable QC (instructed by **Pinsent Masons LLP**) for the **Appellant**
Riaz Hussain QC (instructed by **DLA Piper UK LLP**) for the **Respondent**

Hearing date : 15 July 2021

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Approved Judgment

LORD JUSTICE COULSON :

1. INTRODUCTION

1. This appeal raises three fact-specific points arising out of the order of Fraser J ("the judge") dated 9 October 2020, by which he dismissed the appellant's application for summary judgment. The grounds are narrow because the judge made detailed findings about the adequacy of the security offered by the appellant (a company in liquidation), and it is seeking to argue, not that those conclusions were wrong, but that there were alternative offers of security which the judge did not address in his judgment.

2. However, 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.

3. Accordingly, I set out in Section 2 the factual background, and in Section 3 some of the relevant parts of the judge's judgment. I set out the three grounds of appeal in Section 4. In Section 5, I identify the burden on a claimant (particularly a company in liquidation) seeking summarily to enforce the decision of an adjudicator. I address the three grounds of appeal in Sections 6, 7 and 8 respectively. In Section 9, I consider the issue already noted: whether a company in liquidation in the circumstances of the appellant is entitled to summary judgment. In Section 10, I address briefly a final matter of principle, concerned with a possible stay of execution. I also note the matters raised in the Respondent's Notice, on which there was no time for any submissions at the appeal hearing.

4. I am very grateful to both leading counsel for the excellence of their written and oral submissions. I should make it clear that, on behalf of the appellant, Mr Constable had no involvement in this case until the appeal.

2. THE FACTUAL BACKGROUND

5. The appellant, John Doyle Construction Limited ("JDC"), was a construction company which has been in liquidation since 2013. The respondent, Erith Contractors Ltd ("Erith") remains in business as a construction company. There has never been any issue as to its solvency.

6. The dispute between the parties is very stale. It dates back to a sub-contract ("the Sub-Contract") between Erith and JDC for hard landscaping works at the Olympic Park in East London. The work was part of the preparations for the 2012 Olympic Games. The contractual hierarchy was this. BAM Nuttall Ltd ("BAM") was engaged by the Olympic Development Authority as a Management Contractor in respect of certain construction work for the northern part of the Olympic Park. Erith were engaged by BAM to carry out some of that construction work, including the hard landscaping works. In July 2010, Erith and JDC entered into the Sub-Contract, pursuant to which Erith sub-contracted the hard landscaping and associated works to JDC. The Sub-Contract included the NEC3 standard form (which included an adjudication provision at clause W2), together with various standard additional clauses and amendments.

7. On 21 June 2012, just before the completion of the Sub-Contract works, JDC entered into administration and stopped work. A year later, on 13 June 2013, JDC entered creditors' voluntary liquidation. Following JDC's cessation of work, Erith were obliged to complete the Sub-Contract works themselves.

8. Thereafter a dispute arose as to the value of JDC's final account. For reasons which are unclear, JDC's liquidators were unwilling to pursue any adjudication themselves (despite the fact that any adjudication would have been cost-neutral). Eventually, in 2016, they looked to a company called Henderson & Jones Ltd ("HJ") to pursue the claim. HJ are said to have expertise in dealing with contentious insolvency claims and the ability to pursue recoveries from third parties. On its website, HJ describes itself as a company who "*purchases litigation and arbitration claims for immediate money and/or share of the proceeds*." The primary business model of HJ was further described by Mr Henderson, a solicitor by profession, at paragraphs 6 and 7 of his witness statement:

> "The primary business of HJ is to purchase legal claims from insolvent companies…HJ provides a solution, by purchasing the claim from from the Insolvency Practitioner and/or insolvent company and commencing proceedings itself. The Insolvency Estate will receive a mixture of upfront cash consideration and deferred consideration, calculated and paid by reference to the eventual outcome."

9. On 8 December 2016, JDC's liquidators and HJ entered into a Deed of Assignment ("the Assignment Deed") in respect of the final account claim against Erith. It is, I think, common ground that this did not create an effective legal assignment of JDC's claims against Erith (as opposed to a possible equitable assignment), because the bespoke NEC3 terms and conditions of the Sub-Contract contained a non-assignment clause, and Erith refused to consent to the assignment.

10. It is unnecessary for present purposes to recite the terms of the Assignment Deed in detail. The following points should, however, be noted (helpfully summarised by the judge at [26] of his judgment):

    i) The Assignment Deed envisaged that it might not lead to an effective legal assignment, and in those circumstances provided that the claims against Erith would be held on trust for HJ "absolutely" (Clause 3.1);

ii) HJ paid JDC £6,500 for the assigned claims, with a further payment to JDC dependent on the outcome of the assigned claims (Clause 4);

iii) HJ had conduct and control of any proceedings pursued in relation to the assigned claims (Clause 8);

iv) Any sums recovered were to be paid to HJ; and

v) 45% of any net recovery in subsequent proceedings was to be paid out to JDC by HJ. In this way, HJ would retain 55% of the net recovery.

11. On 22 January 2018, JDC commenced an adjudication against Erith for sums they claimed to be due pursuant to its final account under the Sub-Contract. The claim was for approximately £4 million. Erith denied the claim and submitted that, on a proper analysis, JDC had already been paid more than £3 million too much. The adjudicator also dealt with a relatively modest claim that Erith had against JDC in respect of a claim under a separate contract. There were no other contractual or non-contractual claims or cross-claims.

12. The adjudication took over 5 months. That itself may indicate that the claim may not have been suitable for adjudication, given that the statutory adjudication process requires a period of 28 days, with a maximum period - if extended by agreement - of 42 days[1]. By a decision dated 29 June 2018, the adjudicator decided in JDC's favour, in the sum of approximately £1.2 million (interest and VAT inclusive) ("the Decision"). Erith immediately challenged the Decision by way of a Notice of Dissatisfaction.

13. The Decision of 29 June 2018 was not the subject matter of an enforcement hearing for over two years. Unusually, there were a number of important events and delays between the Decision and the commencement of the enforcement proceedings.

14. First, HJ and JDC's liquidators entered into a new Deed of Agreement ("the Agreement Deed") on 13 December 2019. The terms of the Agreement Deed were plainly intended to avoid the risk that, in any application to enforce the Decision, the existing arrangements between the liquidators and HJ might be found to be champertous and therefore unenforceable. That concern arose out of the decision of the deputy judge in *Meadowside Buildings Development Ltd (In liquidation) v 12-18 Hill Street Management Co Ltd* [2019] EWHC 2651 (TCC) ("*Meadowside*"). I return to that authority in Section 9 below[2]. As part of his Respondent's Notice, Mr Hussain maintains that the Deed of Agreement did not 'save' the arrangements between the liquidators and HJ in the way that was intended.

15. A week later, on 20th December 2019, JDC'S solicitors wrote a letter before claim, seeking the £1.2 million found due by the adjudicator. In the letter, they tacitly recognised that there was a risk to Erith that, if they paid the sum identified in the

[1] I acknowledge that the parties consented to the adjudicator's repeated requests for an extension, but it is always difficult for either party to refuse such requests once an adjudication – with all its attendant costs and effort - is up and running. The mere fact that this adjudication took so much longer than the statutory process envisages could be said to support the proposition that, just because construction adjudication is quick and cheap, it does not make it an appropriate dispute resolution method in every case.

[2] I note that Mr Constable was the deputy judge who decided *Meadowside*.

Decision to a company in liquidation, the money would be distributed, and there would be little or nothing to be recovered if it was later to transpire that the adjudicator had been wrong and that Erith had overpaid. But their offer of security was in unusual form, by way of a letter of credit and an ATE insurance policy. This offer assumed that the sum found due by the adjudicator would be paid out by Erith to JDC's liquidators (and therefore, in consequence of the express terms of the Assignment Deed, to HJ). There was further inter-solicitor correspondence on the subject of security, which generated considerable heat but little light. I refer to the most significant elements of that correspondence in Sections 7 and 8 below, when dealing with the relevant grounds of appeal.

16. JDC did not issue a claim form until 9 April 2020. They sought to enforce the Decision by way of summary judgment. The claim form, the particulars of claim, and the application for summary judgment all sought judgment in the sum of £1.2 million odd. There was no qualification or reference to the provision by JDC of any sort of security, much less an undertaking (either by the liquidators or by HJ) that the sum claimed would in any way be "ring-fenced" following judgment.

17. The hearing of the contested summary judgment application was originally set down for 17 June 2020. Because the Supreme Court were about to hand down their judgments in *Bresco*, that hearing was postponed until 2nd July 2020, in order that both parties could take account of the Supreme Court's conclusions. For that hearing, the judge was provided with copious witness statements and detailed correspondence, a number of authorities, and lengthy written submissions. After the hearing, the judge raised a simple question about the previous Court of Appeal decision in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522 ("*Bouygues*"), which generated a further lengthy submission from JDC.

18. On 14th September 2020, the judge handed down his judgment, refusing to grant summary judgment in favour of JDC. He circulated an order to that effect on 9th October 2020. On the same day, JDC filed an appellant's notice with the Court of Appeal. On 10th December 2020, I granted permission to appeal and estimated that the hearing would last one day. Erith served a Respondent's Notice on 23 December 2020 which raised other issues as to whether the proceedings were an abuse of process and/or whether the arrangements between JDC and HJ failed to comply with the Damages Based Agreement Regulations 2013. The parties did not revisit the time estimate to reflect these points. So when the hearing took place on 15 July 2021, the issues raised by the appeal itself took the full day that I had estimated, leaving no time to deal with the issues raised in the Respondent's Notice.

3. THE JUDGMENT

19. By reason of the range and scale of the evidence, the length of the skeleton arguments, and the matters which counsel raised orally at the hearing, the judgment ran to 147 paragraphs ([2020] EWHC 2451 (TCC)). Some parts of the judgment were concerned with the process and procedure which the TCC has created for adjudication enforcement, and how and why this claim (and possibly others involving claimant companies in liquidation) was not appropriate for that process. I have more to say about the burden on a claimant in adjudication enforcement, and the appellant's purported discharge of that burden in this case, in Section 5 below.

20. Another difficulty for the judge was that, because the decision in *Bresco* was only handed down by the Supreme Court on 17 June 2020, he was inevitably feeling his way through the consequences of the significant change in practice that *Bresco* heralded, and how that played out in the application before him. This may have led to a longer judgment than the judge would have liked, but it cannot be said that the judge did not properly answer all the important points of detail which had been addressed to him.

21. Starting at [86], the judge focused on the mechanisms of security offered by JDC or HJ. He dealt first with the security for the sum of £1.2 million odd which was being sought by way of summary judgment. He noted at [86] that no undertakings or security had been offered by JDC's liquidators, and that the security that was offered came only from HJ. He considered that security, being the letter of credit and an ATE insurance policy, in detail; between paragraphs [86] and [102], he carefully analysed the sufficiency of that security and explained how and why it was inadequate. No issue is taken on this appeal with that analysis and reasoning.

22. The second issue for the judge concerned whether or not adequate security had been offered for any costs orders in Erith's favour in the future if, having paid over the sum found due by the adjudicator, they made a claim for repayment based on their own set-off and counterclaim. The security was in the form of another ATE insurance policy. There was also a reference to a template Deed of Indemnity which was said to deal with the exclusions in the policy to which Erith had objected. The judge addressed the adequacy of this offered security at [103]-[119], and again found that it was inadequate. No issue appears to be taken with the judge's analysis and reasoning insofar as it relates to the ATE insurance policy; the complaint is about the judge's short criticism of the template Deed.

23. By reason of the inadequacies in the security offered, the judge concluded that summary judgment should not be granted to JDC. However, in case he was wrong about that, he went on to consider whether, if judgment was entered, a stay of execution should be granted in any event. For the reasons set out at [121]-[133] of the judgment, the judge concluded that, even if the appellant had been entitled to summary judgment, he would have granted a stay of execution in any event.

4. THE THREE GROUNDS OF APPEAL

24. Ground 1 concerns the security to be provided by or on behalf of JDC if Erith were required to pay out the sum of £1.2 million to a company in liquidation. As I have said, no issue is taken with the judge's finding that the security offered by HJ was inadequate. However, JDC submit that the judge should have found, not only that the liquidators had themselves offered security, but that the security which they had offered, being the payment of the judgment sum by Erith into an escrow account or into court, was adequate. This potential 'offer' was not addressed by the judge in his judgment. Erith say that that was because it was not the basis on which security was argued by JDC at any stage before the judge.

25. Ground 2 concerns whether, assuming Erith had paid out the sum identified in the Decision, they had been offered adequate security for any costs orders in their favour if they subsequently commenced proceedings to recover that amount or more, based on what they said was the proper valuation of JDC's final account. The appeal on this

ground is primarily based on the argument that the judge erred in concluding that the Deed of Indemnity would only be engaged upon the commencement of litigation *by JDC*, and was therefore inadequate as security for Erith's costs in any action which Erith itself commenced seeking repayment. JDC's argument is that there were side letters which provided sufficient assurance that the Deed of Indemnity would be engaged if proceedings were commenced by Erith. Erith notes that there is no challenge to the judge's conclusions as to the inadequacy of the ATE insurance policy itself, and maintains that the Deed of Indemnity did not constitute an offer of security at all.

26. Ground 3 also goes to the issue of security for Erith's costs in any future action. It is an argument to the effect that, even if the ATE insurance policy and/or Deed of Indemnity did not of themselves constitute adequate security for those costs, the judge erred in law in holding that Insolvency Rule 6.42 did not provide adequate security for Erith (such that the security actually offered did not matter). Erith submit that this argument was never advanced to the judge, so cannot legitimately arise on appeal, and that in any event the argument is unsound in law.

27. Thus, in relation to each of these grounds of appeal, there is an issue as to what was and what was not argued before the judge. It is therefore necessary to say a word or two at the outset about the burden on a claimant – particularly a company in liquidation - in an adjudication enforcement application.

5. BURDEN ON A CLAIMANT IN AN APPLICATION TO ENFORCE THE DECISION OF AN ADJUDICATOR

28. Any application summarily to enforce the decision of an adjudicator in the TCC is subject to a bespoke and streamlined service. The claim form should be in simple terms, identifying the adjudicator's decision which is the basis of the claim. The application for summary judgment will be supported by a short witness statement, attaching the agreement to adjudicate and the decision. If it is clear from the pre-action correspondence that a particular point is being taken by the defendant in answer to the application, it is usually no bad thing for that issue to be addressed upfront in the witness statement. Time for acknowledgement of service is usually abridged, and the Court will make directions leading to a hearing of the summary judgment application within 28 days of the commencement of the proceedings.

29. This process evolved in order to ensure that the speedy adjudication process created by the Housing Grants (Construction and Regeneration) Act 1996 was not derailed by delays in the subsequent enforcement of the adjudicator's decision. Although it has come at some cost to other court users in the TCC (because they can sometimes be bumped down the queue for interim appointments in order to prioritise adjudication enforcement hearings), it has generally been regarded as a great success. It is one of the reasons why, speaking personally, I rather cavil at the suggestion that construction adjudication is somehow 'just a part of ADR'. In my view, that damns it with faint praise. In reality, it is the only system of compulsory dispute resolution of which I am aware which requires a decision by a specialist professional within 28 days, backed up by a specialist court enforcement scheme which (subject to jurisdiction and natural justice issues only) provides a judgment within weeks thereafter. It is not an alternative to anything; for most construction disputes, it is the only game in town.

30. A company in liquidation such as JDC, which has purported to assign its stale construction claim to a third party, is not perhaps the sort of court user that the TCC had in mind when it created this procedure, particularly because in *Bouygues,* decided over 20 years ago, the Court of Appeal had made it plain that such claims could not be the subject of summary enforcement *at all*. Even if the decision in *Bresco* has modified that underlying position[3], this case has illustrated that such enforcement claims, unless clearly thought through at the outset, can have their own complexities which are perhaps unsuited to the streamlined process.

31. In any event, it is important that a claimant company in liquidation, seeking summarily to enforce an adjudicator's decision, should take all necessary steps to ensure that the hearing itself is as efficient as possible, and that it is clear to everyone what issues the judge is being asked to decide. *Bresco* stated that the potentially complex issues that can arise between the parties where the claimant is in liquidation were for the judge to sort out at the enforcement stage: as this case again shows, that burden is not to be underestimated. The least the claimant can do is to make its own position crystal clear.

32. In particular, any undertakings or security being offered by a claimant company in liquidation need to be clear, evidenced and unequivocal. It is not for the judge to point out during the hearing potential inadequacies with the security offered, in order to give the claimant an opportunity to amend its offer on the hoof in the hope of making it more acceptable. Neither is it for the judge to endeavour to turn vague suggestions by counsel, in the cut and thrust of oral argument, into a potentially binding agreement between the parties, or to try and tease out of the material before the court whether some other offer could or might have been made instead and, if so, what its hypothetical consequences might be. Such an approach gives rise to confusion and potential injustice. If a claimant wants to summarily enforce the adjudicator's decision, notwithstanding its own liquidation, it needs to be unequivocal about any offer that it is making to ring-fence that money or otherwise protect it. Where there is a dispute about the sufficiency of the undertakings or security on offer, it must at least be beyond argument what has been offered and why.

33. In the present case, JDC failed to follow this simple course. Their evidence was unnecessarily extensive, relying on four witness statements from three different people, all of which also exhibited numerous documents. Mr Henderson's first witness statement alone ran to 27 pages and 123 paragraphs, and exhibited a raft of documents. The skeleton argument produced on behalf of JDC for the hearing was 50 pages long. The hearing lasted the best part of a day and the transcript of the proceedings is 66 pages in length. JDC's written and oral submissions was 'supplemented' by 12 pages of post-hearing submissions, most of which strayed well beyond the short point on which the judge wanted an answer. It would hardly be surprising if, out of this morass, it was not always precisely clear, either to Erith or the judge, what it was that JDC/HJ were actually offering, or on what basis.

34. Many of these difficulties were the direct result of what I consider to be the unhelpfully aggressive approach to enforcement adopted by JDC's liquidators and HJ. HJ wanted to recover and have the use of the money identified in the Decision, and were much less concerned about any question of ring-fencing that money or providing

[3] This is discussed in greater detail in Section 9 below.

security to Erith. Thus the claim documents, and the application for summary judgment, made no mention of undertakings or even the provision of security, and even the inter-solicitor correspondence (which did talk about the latter possibility) was premised on the assumption that the money would be paid out by Erith to HJ (via JDC). As a result of this stance, there was never any offer by JDC's liquidators of a simple and straightforward undertaking to provide sufficient ring-fencing of the money in issue.

35. In addition, in the undergrowth of inter-solicitor correspondence, JDC sometimes hinted at alternatives, offering a grudging concession on one point, but replacing it with a new requirement, gradually reducing the aggression of its stance, without giving it up altogether. This too gave rise to inappropriate levels of complexity and confusion.

36. In my view, this flawed approach is the principal reason why this case is where it is. It explains JDC's failure before the judge. It has prevented the early determination of this case on the merits, by way of a trial of the issues raised by the final account dispute which, but for the failed attempt to obtain summary judgment, would have been concluded by now[4]. In addition it has meant that, on this appeal, JDC has been obliged to scrabble about in the bundles and transcripts, trying to demonstrate that there was some form of secondary or tertiary offer of security which, although never clearly articulated to the judge, and clearly contrary to their basic demand that the money be paid over to HJ for HJ's use, should somehow have been separately addressed in the judgment.

6. GROUND 1: THE RINGFENCING OR SECURITY OFFERED BY JDC IN RESPECT OF THE SUM IDENTIFIED IN THE DECISION

37. In his judgment, the judge said that the security offered by JDC in respect of the sum identified in the Decision comprised a letter of credit and the ATE insurance policy. As noted above, he carefully analysed the nature and adequacy of that security and found it wanting. There is no suggestion that the judge's analysis of the adequacy of the letter of credit and ATE insurance policy was in any way deficient.

38. Unusually, the complaint is that the judge did not address what is now said to be an alternative offer of security, namely the liquidators' 'offer' that Erith should pay the amount identified in the Decision into an escrow account, alternatively that they should pay that sum into court. I note that ground 1 of the appeal goes so far as to say that the judge's finding that the liquidators made no such offer was "a finding of fact which no reasonable judge could have reached". In his oral submissions, Mr Constable rowed back considerably from this assertion, accepting expressly that JDC's counsel failed to make the position clear to the judge and that it was this "confusion" which led to the error. Despite that rather more emollient approach, for the reasons set out below, I consider that any criticism of the judge in this respect is entirely misplaced.

39. The starting point, as advertised in Section 5 above, is straightforward: Did the liquidators of JDC make a clear and unequivocal offer that Erith should pay the sum identified in the Decision into an escrow account or into court, which would then

[4] The average time for the conclusion of a two party action of this kind in the TCC is about 15 months.

serve as the necessary security for Erith's set-off and counterclaim? Was that an offer the adequacy of which the judge had to determine? In my view, the answers to both those questions is in the negative.

40. That it was the letter of credit and the ATE insurance policy – and nothing else - that comprised the proffered security can be seen in numerous places. In the statement of Mr Joyce, JDC's solicitor, at paragraphs 4.3.8-4.3.10 he said expressly that the security being offered to Erith was the ATE insurance policy and the letter of credit. Those were being arranged by HJ. Mr Joyce made no mention whatever of the possibility of any payment into an escrow account or into court, nor of any offer of any kind by the liquidators of JDC.

41. The evidence shows that this was not inadvertence on the part of Mr Joyce. It was consistent with JDC's solicitors' letters of 8 November 2019 and 14 February 2020. The security was being proffered by HJ and it assumed payment out by Erith of the sum identified in the Decision. As Mr Henderson's first statement made plain at paragraphs 69 – 70, repeated again at paragraph 107(b), this was because any sums paid out by Erith would actually be received by HJ. As counsel then instructed put it to the judge at the hearing: "if you give judgment, and money is transferred to JDC, then they have a legal obligation to pay the money to HJ".

42. That was the underlying premise which permeated all of the evidence before the judge: that on enforcement, monies would be paid out by Erith to HJ (via JDC), so that HJ would have the use of that money. In his second statement, at paragraph 40, Mr Henderson went so far as to say that what happened to any money once it had been paid over by Erith was not a matter that the court needed to trouble itself about. In my judgment, that was about as far removed from the ring-fencing undertaking from the liquidators that commended itself to the deputy judge in *Meadowside* as it is possible to get.

43. It is now suggested by Mr Constable that JDC had a secondary or tertiary case to the effect that the liquidators had offered by way of security, either that Erith or JDC (it was unclear which) would pay the sum found due by the adjudicator into an escrow account, or that Erith could pay the sum into court. The complaint is that the judge failed to deal with this alternative offer, which amounted to adequate security. I reject that submission for reasons of both principle and fact.

44. First, as to principle, I consider that what was required beyond all else was what the deputy judge in *Meadowside* described as "the liquidator undertaking to the court to ring-fence the sum enforced so that it is not available for distribution". That undertaking would address head-on the most obvious risk in paying money to a company in liquidation: that you pay the money out to the liquidator; he or she distributes it; but then, if your set-off and cross-claim is subsequently successful, the liquidator can only repay you at 2p in the pound because there are no meaningful assets. There was no undertaking from JDC's liquidators in this case which removed that risk, as confirmed by counsel then instructed by JDC to the judge at the hearing.

45. Secondly, on the particular facts of this case, an offer as to payment into an escrow account or into court could not have been made by the liquidators, because it would have contradicted the agreement between JDC and HJ which, as Mr Henderson explained, meant that "monies paid by Erith will be paid to HJ". In other words, as

between JDC and HJ, there was no scope for any arrangement other than a mechanism which saw the sum identified in the Decision paid out by Erith to HJ. The evidence before the judge made it plain that HJ wanted nothing less (the aggressive approach which I have deprecated above). JDC were not therefore able to offer anything else. The so-called secondary or tertiary offers would have been inconsistent with that approach.

46. Thirdly, on a proper analysis, I am confident that no such offer was actually made. Dealing first with the alleged offer that payment could be made into an escrow account, Mr Constable suggested that this offer was made: i) at paragraph 107c) of Mr Henderson's first witness statement; ii) at paragraphs 144-147 of JDC's skeleton argument dated 29 June 2020; and iii) in oral submissions at the hearing. On analysis, none of those suggestions stands up to scrutiny.

47. Taking the first paragraph 107c) of Mr Henderson's first statement, he was there addressing one of the many aspects of the proffered letter of credit which Mr Shaw, Erith's solicitor, had been troubled about, namely that the letter of credit would expire 180 days from the date of the letter. Mr Shaw said that this gave Erith too short a time in which to decide whether or not to issue their own proceedings. In that context, Mr Henderson said:

> "107c) In relation to paragraph 53 of his witness statement, Mr Shaw raises an issue with the deadline of 180 days specified in Lloyd's letter of 27 March 2020. The concern, as I understand it, is that this may not be sufficient if Erith were to appeal the Court's decision. It is not clear on what basis Erith would make such an appeal, and, on that basis, Erith's complaint is thoroughly speculative. None the less, I would suggest that:
>
> i) The 180 day deadline is sufficient;
>
> ii) In the alternative, HJ would be willing to undertake to keep the monies in a separate account with Lloyds pending any appeal and to immediately return the monies to Erith in the event of a successful appeal (and as per the outcome of the appeal)."

48. In my view, this was plainly not an unequivocal offer that Erith could pay the sum identified in the Decision into an escrow account. Escrow is not mentioned. Neither is it suggested that the relevant payment into the account would be made by Erith. At most (assuming that the court was unattracted by Mr Henderson's many other arguments crammed into just that one sub-paragraph), it appeared to be a suggestion that, once the money had been paid over by Erith to HJ, HJ could pay it into a separate account with Lloyds pending the outcome of any appeal. That was time-limited and specifically in HJ's gift. It was not an unqualified offer of security and it certainly did not come from the liquidators.

49. That analysis also addresses the second way in which Mr Constable sought to suggest that this offer had been made, because it was this evidence which was the subject of paragraphs 145-147 of the skeleton argument provided by JDC for the enforcement hearing. Those paragraphs can only fairly be read as a simple repeat of the offer at

paragraph 107c) of Mr Henderson's statement, set out above. Paragraph 147 expressly refers back to that evidence. The skeleton was doing no more than repeating the point about the offer to ameliorate the suggested 180 days.

50. Furthermore, the passage in the skeleton refers to "the sums paid over [being] paid into an escrow account". That is wrong in fact, because there is no mention of an escrow account in Mr Henderson's statement. But the passage in the skeleton makes clear that the alleged offer presupposed that the judgment sum would be paid over by Erith to HJ (via JDC), and that it would be HJ who would then put the money into an account at Lloyds (presumably under their control). Again, that was not an offer by JDC's liquidators that adequate security would or could be provided by the payment by Erith of the sum identified in the Decision into an escrow account.

51. That leaves the oral submissions. Mr Hussain made the fair point that something has gone very wrong if an argument about whether adequate security was in fact offered turns, not on the written offers or the lengthy written submissions, but on a forensic analysis of oral submissions, many of which consisted of extended question and answer sessions with the judge. This court should not have to embark on a semantic analysis of the transcript looking for other offers of security that might have been made orally, even if they were unevidenced and unheralded elsewhere.

52. In any event, I do not consider that the alleged offer was made by way of oral submissions either. The relevant passages are between pages 45 and 50 of the transcript. Counsel then instructed on behalf of JDC was referring to *Meadowside* and the reference to "the liquidator undertaking to the Court to ring fence the sum enforced so that it is not available for distribution for the relevant duration". She acknowledged that there was no such undertaking here. There was then a reference to funds being "held in escrow". But the exchanges with the judge then moved on to address that possibility in the specific context of Erith's possible insolvency.

53. The first point to make is that this exchange, on which such reliance is now placed, was, as the judge described it at page 48A of the transcript, "a hypothetical exploration by me of what 'undertaking to ring fence the sum' means". Counsel then instructed by JDC agreed. This was not, therefore, the actual making of an offer by JDC. It was instead a hypothetical examination of what might constitute such an undertaking. The reference to Erith's potential insolvency was also hypothetical: there was never any suggestion that Erith was insolvent, which counsel also acknowledged.

54. In his closing submissions to the judge on behalf of Erith, Mr Hussain emphasised that "no undertakings had ever been offered". That was correct. He also pointed out that there was no suggestion of Erith's insolvency. That too was correct. There was no other 'offer' of security (beyond the letter of credit and the ATE insurance policy) which he therefore addressed (or was required to address) in his submissions.

55. Considering the written material and the transcript of the hearing in the round, the judge cannot be criticised for not considering an alleged offer of security comprising a payment by Erith of the sum claimed into an escrow account. On the contrary, I conclude that no such offer was made, either in the run-up to the hearing, or at the hearing itself.

56. I can deal much more shortly with the suggestion that it was part of JDC's case that the sum identified in the Decision could simply be paid by Erith into court. I am in no doubt that this was never part of JDC's case. First, it would have been contrary to the liquidators' obligation to do all they could to ensure that the sums paid out by Erith went to HJ. Secondly, there was no reference to a payment into court in any of the evidence provided by either party; neither was it ever a suggestion made in the 50 pages of JDC's written submissions. There was one fleeting oral reference to it at page 50A of the typescript but that seemed to be a reference back to something that the judge himself had said during his consideration of the hypothetical situation (paragraph 53 above) and no further reference was made to it. The judge cannot be criticised for not considering it further.

57. There is a wider point too, which is whether a payment into court is in principle a proper way in which security could be provided by the defendant, in the circumstances of an adjudicator's Decision in favour of a claimant company in liquidation. I can see that, in theory, it might be. But it is not a mechanism that has ever been suggested, and therefore considered, in any of the authorities. It was not identified in *Wimbledon Construction Co 2000 Ltd v Vago* [2005] EWHC 1086 (TCC); 101 Con LR 99, which summarised the various options on adjudication enforcement where there is a concern about the claimant's financial position. It was not considered in detail in *Meadowside*; although it is referred to in passing at [137], that appears to be a reference to a claiming party providing security for the defendant's costs by making a payment into court, which is a different thing. If a payment into court of the sum due had been regarded as a proper way in which a defendant could obtain security for its own set-off and cross-claim against the insolvent claimant, it is surprising that the possibility was not raised in either case.

58. Furthermore, I cannot help but feel that an order requiring payment of such monies into court is the worst of all possible worlds. It is contrary to the underlying philosophy of construction adjudication because, instead of maintaining construction industry cash flow, it would deprive Erith – a working contractor - of cash, whilst leaving the money sitting uselessly in the court's account. It would not be available for distribution by the liquidators of JDC, so it is difficult to see how it is of any benefit to them. It would sit there accruing minimal interest until, presumably, the underlying claims and cross-claims had been the subject of a final determination. It would then either be paid back to Erith (if they were successful) or paid out to JDC (if they were successful), but since there is no issue as to Erith's solvency, such payment out to JDC would have happened anyway. Thus, if it is a proper method of security (about which I express no concluded view), it seems to me that it should be regarded as very much a last resort[5].

59. In all those circumstances, therefore, the judge was entitled to conclude that the security offered by JDC was the letter of credit and the ATE insurance policy. That form of security was consistent with JDC's primary aim, which was to obtain payment out of the sum identified in the Decision so that it could be paid on to HJ. There was nothing which could have led the judge to conclude that, as a viable alternative, JDC were suggesting that HJ would not get the money after all, and that they were happy for it to be paid either into an escrow account or into court.

[5] Much of this analysis would also apply to a payment into an escrow account.

60. Furthermore, I consider that two subsequent events confirm that conclusion. The first occasion was when the judge circulated his draft judgment. If JDC's argument on ground 1 had been right, they would have been surprised that (on their case) the judge had acted as no reasonable judge could have done, and not dealt with what they now say was the liquidators' alternative offer of security. At the very least, it would have been something that they felt he had overlooked. In such circumstances, they would have been duty bound to raise that oversight with the judge. They did not do so. They failed even to seek his permission to appeal on the point. That only confirms my view that, on a proper analysis, this 'offer' was never part of JDC's case.

61. The second, and even more significant event, occurred some weeks after the judgment was handed down. In yet more inter-solicitor correspondence, JDC's solicitors made another offer which expressly identified payment by Erith into court or into an escrow account. The first relevant letter, dated 2 October 2020, said that "JDC has revised its security arrangements" and stated – for the first time – that "the liquidators of JDC have agreed to provide an undertaking that any sums paid pursuant to the adjudication decision are to be ring-fenced" and that "any sums paid pursuant to the adjudication decision will be paid into court (as foreshadowed by Fraser J during the hearing) or into an escrow account".

62. This offer was said expressly to be "a revised offer", with the clear implication that it had not been made before. In my view, JDC's solicitors were now attempting to offer what they had not offered before, prompted perhaps by the judge's exploration of the hypothetical position at the hearing. Subsequently, it was also confirmed that the money would not be payable to HJ. The solicitors' letter of 11 November 2020 set out what were called "Revised security arrangements" and Clause 4.2 of the revised offer made clear that "HJ agrees that it shall assert no right to any monies paid to JDC that are held pursuant to the ring-fencing agreement or paid into Court or escrow".

63. It appears from those letters that JDC's solicitors accepted that this revised offer had not been made at the time of the hearing before the judge, and therefore did not fall to be considered by him. I am in no doubt that it was new. The revised offer was not something which had arisen before the judge, so it cannot legitimately arise on an appeal against his order.

64. Accordingly, for all these reasons, if my lords agree, ground 1 of this appeal must fail.

7. GROUND 2: THE SECURITY OFFERED BY JDC IN RESPECT OF FUTURE COSTS ORDERS IN ERITH'S FAVOUR

65. The second category of security that was relevant to the application before the judge was the security to be provided by JDC for any costs that Erith might be awarded if or when they pursued their own set-off and cross-claim. It was said that sufficient security for those costs was provided by another ATE insurance policy in the name of 'Thomas Miller Legal' of 90, Fenchurch Street, London EC3M 4ST. That was the offer made in the inter-solicitor correspondence, and evidenced in the witness statements.

66. In the judgment at [103]-[109] and [111]-[114], the judge explained the various reasons why this ATE policy was insufficient. It was not entirely clear if JDC disputed the judge's conclusions in relation to this ATE policy: they did not seem to,

because Mr Constable's submissions were all concerned with the separate Deed of Indemnity, which I address below. For the avoidance of doubt, however, I should make clear that I consider the judge's criticisms of the exclusions/limitations in the ATE policy to be well-founded. On its proper construction, the policy did not provide adequate security for Erith's costs. That leaves the Deed of Indemnity.

67. At paragraph 121 of his first witness statement, Mr Henderson suggested that there was a possibility[6] of a Deed of Indemnity instead of or in conjunction with the ATE policy, although such a Deed would require a cross-undertaking in damages by Erith. It was not couched as a firm offer: the highest that he put it was that he would make enquiries about the possibility of providing a Deed.

68. On 24 June 2020, shortly before the hearing before the judge, JDC's solicitors wrote enclosing the updated ATE policy. They also said in their letter:

> "In response to paragraph 7.3 of Mr Shaw's second witness statement, we enclose this standard form wording of the bond ('Deed of Indemnity') which is to be provided by the insurers named in the ATE policy. Each insurer will issue a Deed of Indemnity for their share of the risk, as they are underwriting the risk on a several liability basis…in line with the submission set out in the Claimant's skeleton argument served prior to the original hearing date, if a Bond is to be put in place, the costs of the same should be met by a cross-undertaking in damages from [Erith], in line with recent authorities".

The template Deed of Indemnity was enclosed with the letter.

69. The Deed of Indemnity was not otherwise referred to in the evidence. The judge dealt with it shortly. He said at [110]:

> 110. "Reliance is also placed by JDC on what is said to be a "standing offer" to provide a Deed of Indemnity or Bond. However, that "standing offer" is part of the ATE Policy, and is offered by the Insurer, TM Legal, as defined in the policy "to meet a security for costs order" (emphasis added). The dispute defined in the Schedule states "the claim will be brought either by John Doyle Company Ltd (acting by its liquidators) or Henderson & Jones Ltd as assignee (as beneficiary under a trust)". It is not something outside of, or additional to, the ATE Policy, but in any event it would be available if an action were commenced by JDC and a security for costs order was made against it. JDC might not commence such proceedings; indeed, if this summary judgment application is successful, it is difficult to envisage circumstances in which JDC would choose to do so. The Deed of Indemnity would not, on the face of it, provide security in respect of a costs order made in proceedings commenced by Erith against JDC, which is a rather different scenario, and the more likely way that subsequent proceedings would unfold."

[6] What he actually said was: "it would be possible to ask Thomas Miller to put in place a security bond".

70. Ground 2 of JDC's appeal is based on the proposition that the Deed of Indemnity was offered to Erith and that it was sufficient for the purposes of security. Mr Constable accepted that, if one looked just at the Deed, the judge had been right to say that it related only to security for JDC's costs in a claim *against* Erith, and not the other way round. But he argued that the judge failed to have regard to an email from Thomas Miller which indicated to Mr Henderson that "'Dispute' [as defined in the Deed] also includes any claim brought by Erith against John Doyle Construction". Mr Constable accepted that this email had not been brought to the judge's attention at the hearing.

71. In my view, that email was not an answer, either to the specific point raised by the judge, or the wider concern about the template that Mr Hussain articulated on behalf of Erith. As to the specific issue, the evidence about the email was vague. It was not clear precisely who Thomas Miller were, and who they were acting for. It was not clear how an exchange of emails between their representative and Mr Henderson of HJ could be relied on in law by Erith against any insurer actually providing this indemnity. Moreover, the point made by the judge simply highlighted that the whole structure of the template Deed was the wrong way round: this was a conventional arrangement to cover JDC if they were ordered to provide security for costs when bringing a claim against a defendant; it was not the particular security arrangement required to protect Erith against costs orders in their favour in their own proceedings against JDC. That mismatch also explained why a cross-undertaking in damages was sought, something that was again wholly inappropriate for this specific situation.

72. But in my view, there was a wider and insurmountable difficulty with the template Deed of Indemnity. What was missing from the evidence was any statement by any insurer that they were prepared to offer Erith *this* Deed in *this* case, as security for any orders for Erith's costs that may be made in proceedings in which they pursued JDC for repayment. For reasons which are not explained, the template is in the name of a firm of insurers (Hamilton Insurance DAC) who it was expressly said would *not* be providing the indemnity. No other potential insurer was identified. Whilst I agree with Mr Constable that it was not for JDC to *complete* such arrangements with insurers, much less pay a large premium to do so, there did need to be evidence that this Deed of Indemnity in this particular form, relied on as a critical element of the security offered, would be provided by reputable insurer(s) to Erith to meet the facts of this case. There was no such evidence here. In my view, that was sufficient reason alone to reject the Deed of Indemnity as adequate security.

73. In his oral submissions to the judge, Mr Hussain made all these points (no identified insurer, no actual offer, cross-undertakings sought etc) to the judge: see pages 61-63 of the transcript. In response, all that was said was that, if the judge thought that the Deed was appropriate in principle, then judgement should be entered, with enforcement stayed whilst an insurer was found.

74. In my view, that was not an appropriate approach to a summary judgment application. Once more, the real problem with JDC's position can be traced back to their desire to take as much as they could on enforcement whilst giving as little as possible. Their primary position was an inadequate ATE Policy. Their secondary position was a Deed that incorrectly required cross-undertakings in damages from Erith. And their tertiary position was that, if it had to be the Deed without the cross-undertakings, then they

needed more time to get an actual offer and put the necessary arrangements in place[7]. In my view, that is how *not* to go about enforcing a judgment on behalf of a company in liquidation when there is an extant cross-claim. The building blocks of any security being offered – for what? by whom? on what terms? – need to be in place before it can be assessed by the offeree and by the court. That is not, as Mr Constable put it, just a question of "ironing out details": it is much more fundamental than that. Offers of security should not be allowed to degenerate into an extended game of 'whack-a-mole'.

75. In my view, the judge was right to reject both the ATE policy and the Deed of Indemnity. Neither provided adequate security for Erith's costs. It appears that this may have been finally accepted by JDC: I note that the revised offer referred to in paragraphs 61-63 above makes no mention of either the ATE policy or this Deed of Indemnity. If my lords agree, I would dismiss ground 2 of the appeal.

8. GROUND 3: INSOLVENCY RULE 6.42

76. Rule 6.42(1) provides that "all fees, costs, charges and other expenses incurred in the course of the winding up are to be treated as expenses of the winding up". Rule 6.42(4)(a) prioritises expenses incurred by the liquidator in legal proceedings over the costs and expenses of the liquidation. Ground 3 of the appeal suggests that, if the ATE policy and/or the Deed of Indemnity did not of themselves constitute adequate security for Erith's costs, the judge was wrong in holding that Insolvency Rule 6.42 did not itself provide security for any costs orders which may be made in favour of Erith in subsequent proceedings. In other words, ground 3 is an alternative to ground 2; it does not affect the principal part of the appeal arising under ground 1, in connection with the £1.2 million. In any event, for the reasons set out below, I consider that ground 3 is untenable.

77. First, I am confident that this argument is not open to JDC on appeal, because they never suggested to the judge that the Rule itself provided the necessary security. They raised the Rule tangentially in their post-hearing submissions (when it did not go to the point on which the judge asked a short question) but even then they did not suggest that the Rule itself could provide the necessary security for costs orders in Erith's favour. The judge was therefore entitled to treat the post-hearing reference by JDC to Rule 6.42 as simply a part of the debate about the adequacy of the ATE policy, as he did at [83].

78. Secondly, in the absence of any evidence that, at the end of any litigation pursued by Erith to recover any over-payment, there would be any sums available to the liquidators to disburse to Erith as expenses, I do not consider that Insolvency Rule 6.42 has any relevance.

79. Thirdly, I do not consider that the Rule (or the authorities, like *Re MT Realisations Ltd* [2004] 1 WLR 1678) are of assistance in this situation. Rule 6.42(4) puts various expenses in order of priority. Rule 6.42(4)(a) prioritises expenses incurred by the liquidator in legal proceedings over the costs and expenses of the liquidation. But that would concern proceedings brought *by* the liquidators of JDC. It simply does not follow that, if Erith commenced proceedings for repayment and obtained costs orders

[7] I am afraid that that is JDC/HJ's approach (outlined in paragraph 35 above) in action.

against the liquidator in those proceedings, those costs orders would be prioritised at all. JDC's argument must be that they would be prioritised because they were effectively part of the adjudication enforcement proceedings started by the liquidator. But are they? It would be said by the liquidators that any proceedings commenced by Erith had nothing to do with the adjudication; that Erith had taken it upon themselves to commence their own proceedings against an insolvent company; and so they took the risk that any costs orders in their favour would not be met. That was surely why JDC offered security for those costs (albeit an offer found by the judge to be inadequate) in the first place.

80. Fourthly, Mr Constable indicated that, because he said that the liquidators had collected in and paid out assets worth over £712,000, they would be potentially liable to Erith up to this sum pursuant to this Rule. But there was no evidence to support that figure in the many witness statements[8]. More importantly, I reject the notion that proper security can be found in the ability of Erith – at the end of its cross-claim against JDC - to sue the liquidators personally for any costs orders which have not been met. That is simply too uncertain and speculative to amount to security in the true sense of the word.

81. Accordingly, I reject JDC's submissions that in some way Insolvency Rule 6.42 provides Erith with the necessary "reasonable reassurance" that adequate security exists in respect of any subsequent costs orders in their favour. If my lords agree, I would dismiss ground 3 of the appeal.

9. IS A COMPANY IN LIQUIDATION ENTITLED TO ENTER JUDGMENT IN THESE CIRCUMSTANCES?

9.1 The Law

82. The judge said that, although it will be far from the usual case, there may be circumstances in which a company in liquidation could enforce the decision of an adjudicator. He did not address this issue further. That may be because he was able to decide the application on other grounds, and it may also be because of the short time he had had to assimilate the decision in *Bresco*. But it seems to me to raise a potentially important question. 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?

83. The starting point is *Hanak v Green* [1958] 2 QB 9. In that case, Mrs Hanak was entitled to £75 in respect of defective work, but Mr Green was entitled to £84 for extras and delay. The Court of Appeal found that the judge had been wrong to enter judgment for Mrs Hanak and Mr Green separately; they found that Mr Green's cross claim gave rise to an equitable set-off and that therefore judgment should have been entered in his favour, but solely in relation to the balance of £10. Similarly, in *MS New World Fashions* Hoffman LJ (as he then was, sitting at first instance) said that in comparable circumstances, "neither party can prove or sue for his claims. An account must be taken and he must prove or sue (as the case may be) for the balance". That approach was approved by the Court of Appeal.

[8] The figure was asserted, without evidence, in JDC's lengthy post-hearing submissions where it again had nothing to do with the question that the judge asked the parties to address.

84. The question of set-off in an insolvency case was dealt with comprehensively in *Stein v Blake* [1996] AC 243. In that case the claimant had a claim in contract against the defendants. The defendant counterclaimed for damages for misrepresentation. The claimant went bankrupt and the Trustee assigned the claim to the claimant. The House of Lords held that the chose in action was no longer capable of being assigned; all that could be assigned was the balance due after set-off. Lord Hoffman said at 252:

> "Bankruptcy set-off, on the other hand, affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set-off pound for pound what he owes the bankrupt and prove or pay only the balance".

In this way, Lord Hoffman concluded that the original chose in action ceased to exist and was "replaced by a claim to a net balance".

85. The effect of *Stein v Blake* was noted in the adjudication context in *Bouyges.* There, having cited *Stein v Blake*, Chadwick LJ said:

> "33. The importance of the rule is illustrated by the circumstances in the present case. If Bouygues is obliged to pay to Dahl-Jensen the amount awarded by the adjudicator, those monies, when received by the liquidator of Dahl-Jensen, will form part of the fund applicable for distribution amongst Dahl-Jensen's creditors. If Bouygues itself has a claim under the construction contract, as it currently asserts, and is required to prove for that claim in the liquidation of Dahl-Jensen, it will receive only a dividend pro rata to the amount of its claim. It will be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim.
> 34. Lord Hoffman pointed out, at page 252 in Stein v Blake that the bankruptcy set-off requires an account to be taken of liabilities which at the time of the bankruptcy may be due but not yet payable, or which may be unascertained in amount or subject to contingency. Nevertheless, the insolvency code requires that the account shall be deemed to have been taken, and the sums due from one party shall be set off against the other, as at the date of insolvency order. Lord Hoffman pointed out also that 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. In those circumstances it is difficult to see how a summary judgment can be of any advantage to either party where, as the 1996 Act and paragraph 31 of the Model Adjudication Procedure make clear, the account can be reopened at some stage; and has to be reopened in the insolvency of Dahl-Jensen.
> 35. Part 24, rule 2 of the Civil Procedure Rules enables the Court to give summary judgment on the whole of a claim, or on a particular issue, if it considers that the defendant has no real prospect of successfully defending the claim and there is no other reason why the

> case or issue should be disposed of at a trial. In circumstances such as the present, 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 Insolvency Rules 1986 requires"

86. In *Bresco* the Supreme Court said that the Court of Appeal had been wrong to find that a company in liquidation could not *commence* adjudication proceedings. Lord Briggs explained how and why the commencement of an adjudication, and the determination of a claim in adjudication by a construction professional was not a futile exercise. He said:

> "59. The starting point, once it is appreciated that there is jurisdiction under section 108 in such circumstances, is that 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."

I have taken that to be the *ratio* of *Bresco*. Mr Constable agreed.

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]. His subsequent *obiter* observations on enforcement were as follows:

> "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.

> 65. Furthermore it will not be in every case that summary enforcement will be inappropriate. There may be no dispute about the cross-claim, and the claim may be found to exist in a larger amount, so that there is no reason not to give summary judgment for the company for the balance in its favour. Or the disputed cross-claim may be found to be of no substance. Or, 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.
>
> 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.
>
> 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."

88. Accordingly, it appears that, as to enforcement, Lord Briggs' starting point was that summary judgment to enforce an adjudicator's decision will frequently be unavailable when the claimant is in liquidation, with the court either refusing it outright or granting it with an immediate stay of execution. He also noted that where the liquidator sought to enforce the adjudicator's decision summarily, there could be a real risk that it would deprive the respondent of its right to have recourse to the insolvent company's claim as security for its cross-claim, and that in such circumstances the court would again refuse summary judgment. It might be said with some force that those observations are directly applicable here.

89. The paragraph with which I have had some difficulty is [65]. Lord Briggs gives examples there of case where summary enforcement "will not be inappropriate". The first is where there is no dispute about the cross-claim, and the second is where the

disputed cross-claim may be found to be of no substance. In both those instances, it is perhaps easy to see why summary enforcement would not be inappropriate. It is the third example which is more problematic. That, in the words of Lord Briggs, is where "the cross-claim can be determined by the adjudicator, because the claim and cross-claim form part of the same 'dispute' under the contract." He says that in those circumstances the adjudicator may be able to determine "the net balance". Mr Constable submitted that that was directly applicable to this case, because this was a final account dispute and, leaving aside the small claim on the only other contract between Erith and JDC, the finding of what was due on the final account was therefore a finding of a net balance.

90. The difficulty is that, on the face of it, Lord Briggs' third example takes no account of the fact that an adjudicator's decision is necessarily provisional, and cannot therefore be regarded as the final determination of the net balance. To put the point another way, the third example used by Lord Briggs at [65] would appear to run counter to the reasoning and result in *Bouygues*, where summary judgment was refused.

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. He did not suggest that there was any right to enforce a claim which did not take into account the set-off and cross-claim; on the contrary, he expressly approved both *MS Fashions* and *Stein v Blake.* Neither was he saying that, contrary to what Chadwick LJ said in *Bouygues*, summary judgment should be granted and enforced "on a claim arising out of an adjudication which is, necessarily, provisional". On the contrary, he expressly approved, at [64], what Chadwick LJ had said in *Bouygues*.

92. I should also say something about *Meadowside*, a case on which Mr Constable placed some reliance. The discussion there about what might constitute sufficient security in the right case was expressly approved by Lord Briggs in *Bresco*. On analysis, that discussion was also *obiter*, this time because the deputy judge had refused the insolvent's company's application for summary judgment on the grounds of champerty.

93. In *Meadowside*, there was only a brief discussion about the insolvent company's cause of action being limited to the net balance, and no debate at all about the fact that the final determination of the net balance remained outstanding, because the adjudicator's decision could only be regarded as provisional. Indeed, it does not appear to have been seriously disputed that, because the adjudicator had been dealing with a final account claim, his decision was, in principle, capable of being enforced. There was no discussion about the Insolvency Rules nor the 'provisional' nature of the adjudicator's decision. I quite accept that, in circumstances where the adjudicator has (by express or tacit agreement) finally decided the net balance between the parties, then the consideration would move to security issues. But where the decision remains provisional then, as the deputy judge noted at [56], there is a fundamental incompatibility between adjudication and insolvency and, in such a situation, "it is clear that the rights under the insolvency regime prevail".

9.2 Discussion

94. This was not a case where the parties had agreed that the adjudicator would finally decide the net balance. Erith maintain a set-off and cross-claim and say that JDC have been overpaid, even before account is taken of the sum of £1.2 million identified in the Decision. That set-off and cross-claim has yet to be finally determined. *Prima facie*, therefore, it would appear that, in accordance with the principles of insolvency set-off, there is no entitlement to judgment on the sum provisionally found due to the insolvent company.

95. At one stage, Mr Constable's submissions on this point were very limited: he submitted that JDC was only entitled to summary judgment in this case because the sum due was the 'net balance'; that there were no significant claims under any other contracts; and that there were no non-contractual claims either. He said that it was only because all those conditions were met in this case that there was, subject to the provision of adequate security, an entitlement to summary judgment. However, in answer to a question from my lord, Lord Justice Lewison, Mr Constable went much further and suggested that an insolvent claimant in adjudication enforcement should (subject to jurisdiction and natural justice arguments) always be entitled to summary judgment because, as he said, adjudication was pointless without summary enforcement.

96. In my view, Mr Constable's submission is untenable for a number of reasons. First, it seeks to rewrite *Bresco*. The Supreme Court's focus was on how and why an insolvent claimant should be entitled to commence adjudication proceedings, and should not be stopped by the court from doing so. It was not directly concerned with enforcement at all. There is nothing in *Bresco* to support the proposition that, without summary enforcement, adjudication is futile: on the contrary, Lord Briggs gives numerous reasons as to why adjudication is far from futile even though summary enforcement in favour of an insolvent company would be uncommon.

97. Secondly, I consider that the submission that there is an entitlement to summary judgment in these circumstances is contrary to the clear statement of principle in *Bouygues*, which is not only binding on this court, but was also expressly affirmed in *Bresco*. To the extent that there was a conflict between the adjudication and insolvency regimes, Mr Constable's submission would permit the adjudication regime to prevail, contrary to his own analysis in *Meadowside*. In my judgment, there is no way round these fundamental difficulties.

98. Thirdly, even Mr Constable's more limited submission does not get over the obstacles identified above. I do not consider that the provisional finding of an adjudicator, even on a single final account dispute where no other significant non-contractual or other contractual claims arise, can be treated as if it were a final determination of the net balance, in circumstances where the other party maintains its set-off and cross-claim. It is not a question of security; it is a question of the insolvent company's cause of action being for the net balance only. It is not a matter of discretion because it is impossible to waive or disapply the Insolvency Rules. As my lord, Lord Justice Lewison put it during argument, insolvency set-off must apply to adjudication; it is not somehow an exception. To find otherwise would give rise to incoherence.

99. Another way of looking at it is by reference to the purported assignment of this claim by the liquidators to HJ (paragraphs 9-10 and 14 above). What did they purport to assign? What is it that is held on trust for HJ? It cannot be the claim (see *Stein v*

Blake). Surely it can only be the net balance? And if it is just the net balance, it must in law be the balance as finally determined, not as per the adjudicator's provisional view.

100. Finally, I must reiterate what I said at paragraph 58 above, about the lack of purpose in entering a judgment only to order, at best from the claimant's point of view, the payment of the judgment sum into an escrow account or into court. That is of no immediate benefit to anyone, certainly not to the insolvent company. They may say that it would then act as a spur to the other side to get on with their cross-claim but, as I set out in the next paragraph, that could be achieved in a number of different ways, without pointlessly tying up the money in the way proposed. As I have said, I do not accept Mr Constable's underlying submission 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 (because, just to take an example from Mr Constable's own submissions, he would have to commence his cross-claim within 6 months or lose the protection of insolvency set-off). 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 like Erith to take advantage of JDC's 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 to JDC is summary judgment. That is not so, particularly in circumstances where, as here, the insolvent company can call on the resources of HJ. Having 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. As I have said, on the timetable here, if JDC had not sought summary judgment, but adopted a more realistic approach, the trial of the action would have been completed by now.

102. Accordingly, for all these reasons, even if I had been persuaded that the judge had erred in his consideration of the adequacy of security and allowed one or more of the grounds of appeal, I would have concluded that JDC were not entitled to summary judgment in any event.

10 STAY OF EXECUTION AND OTHER MATTERS

10.1 Stay of Execution

103. It is unnecessary to say very much about a stay of execution in this case because, for the reasons set out above, JDC has not made out its claim that it was entitled to summary judgment. But I should say that, even if I had come to a different view on the prior questions in this appeal, and so would have entered summary judgment on the part of JDC, I would have granted Erith a stay of execution in relation to the whole sum. I explain why briefly below.

104. First, it seems to me that that is consistent with the authorities. In *Bouygues*, Chadwick LJ said that the fact of the claimant's insolvency when there was a cross-claim was a compelling reason to refuse summary judgment, but he was content on that facts of that case, to impose a stay. In *Bresco*, Lord Briggs said that the Court was well placed to deal with difficulties at the summary judgment stage "simply by refusing it an appropriate case as a matter of discretion, or by granting it, but with a stay of execution." Both cases suggest that, in these circumstances, a stay of execution is appropriate even if summary judgment is granted. That should, I think, be regarded as the default position.

105. I acknowledge that, in *Meadowside*, the focus was more on the provision of security so that judgment could be entered without a stay, and the money could be provided to the liquidators, even if it was "ring fenced". I can see that, in the right case, if there was an entitlement to summary judgment, the default position could be set aside and that, instead of a stay of execution, the money could be paid out to the claimant company (obviously subject to the ring fencing). But given the uncompromising stance adopted by JDC in this case – doubtless prompted by the overwhelming desire on the part of HJ to get their hands on the money – I can see that, here, the default option was the only appropriate one.

106. Secondly, I consider that this is consistent with the way in which the TCC has sought to enforce judgments against claimants who, whilst not in liquidation, are in a parlous financial position. The principles were summarised in *Wimbledon v Vago*. If it is appropriate to grant a stay because the payee may be in financial difficulties and there is a risk that the monies will not be returned, it is surely appropriate where the claimant is in liquidation and the claim is almost a decade old.

107. Thirdly, it follows from what I have already said that I reject Mr Constable's submission that, as a matter of principle, whenever the court considered that there were problems with the security or undertakings being offered by the insolvent party, there was still an entitlement to summary judgment with a stay pending the provision of further and better offers. The claimant in such circumstances cannot keep coming back to court on the off chance that, at some point, they may make an adequate offer. The onus is on the claimant throughout, as explained at paragraph 32 above.

108. Finally, I note that the judge dealt with this matter in detail at [121] – [133], explaining why a stay of execution would have been appropriate. In order to limit my own already over-long judgment, I would simply adopt and commend what he said there.

10.2 The Respondent's Notice

109. At the hearing of the appeal, there was no time for either party to address the points in the Respondent's Notice. The principal point taken there is that the arrangements between the liquidators of JDC and HJ were champertous and not a valid Damages Based Agreement. In circumstances where I would dismiss the appeal in any event, it is unnecessary to consider the Respondent's Notice any further.

LORD JUSTICE EDIS:

110. I agree that, for the reasons given by Coulson LJ, this appeal should be dismissed.

LORD JUSTICE LEWISON:

111. I agree with Coulson LJ that the appeal should be dismissed on all three grounds on which it was advanced. But as he rightly says, the appeal raises a wider point. Although I have read and agree with what he says on the wider point, I would like to explain the basis of my agreement in my own words.

112. As Lord Hoffmann explained in *Stein v Blake* [1996] AC 243, set-off has a long history. Legal set-off enabled mutual debts to be set off one against another; but did not affect the substantive rights of either party. Legal set-off in courts of common law was permitted by the Insolvent Debtors' Relief Act 1728, and the Statute of Set Off 1734. The claims on both sides had to be liquidated debts or money demands which could be ascertained with certainty at the time of pleading. At that time, any other cross-claim in a court of common law had to be made in a separate action. It was not until the Supreme Court of Judicature Act 1873 that common law courts could entertain a cross-claim in the same action as the claim. That was, however, mitigated to some extent by the development of the principle of abatement of price.

113. In courts of equity the position was different. A court of equity could grant an injunction restraining proceedings in the common law courts. In order for a court of equity to grant such an injunction it had to be shown that the cross-claim was such as to "impeach the title to the legal demand". In practice what this meant was that the cross-claim was so closely connected with the legal demand that it would be manifestly unjust to allow payment to be enforced without taking into account the cross-claim.

114. Bankruptcy set-off, as Lord Hoffmann explained, essentially follows the equitable model. He said at 252:

> "Bankruptcy set-off, on the other hand, affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and *prove for or pay only the balance*." (Emphasis added)

115. At 254 he approved the following statement in the decision of the High Court of Australia in *Gye v McIntyre* (1991) 171 CLR 609:

> "[Insolvency set-off] produces a balance upon the basis of which the bankruptcy administration can proceed. *Only that balance can be claimed in the bankruptcy or recovered by the trustee.* If its operation is to produce a nil balance, its effect will be that there is nothing at all which can be claimed in the bankruptcy or recovered in proceedings by the trustee." (Emphasis added)

116. Lord Hoffmann continued at 255:

> "In my judgment 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."

117. So it was that Mr Stein's trustee in bankruptcy was unable to assign to him his original claim against Mr Blake. The only relevance (or continuing existence) of the cross-claims is for the purpose of quantifying them in order to ascertain what that balance is.

118. In the case of corporate insolvency, set-off is governed by rule 14.25 of the Insolvency (England and Wales) Rules 2016 ("IR"). IR 14.25 (3) and (4) provide for dealing with the balance. If the balance is owed to the creditor then only that balance is provable. If the balance is owed to the company, then that must be paid to it.

119. In *MS Fashions Ltd v BCCI* [1993] Ch 425 three company directors each signed as a "principal debtor" an agreement with the bank whereby, as guarantee for repayment of loans by the bank to his company, the bank could withdraw money from his deposit account with that bank towards satisfaction of his company's debts. Each of the directors' debts was a secured debt. In 1992 the bank was compulsorily wound up. The directors claimed to be entitled to set off the sums in their deposit accounts against the companies' respective liabilities to the bank. At first instance Hoffmann LJ said at 432:

> "If there have been mutual dealings before the winding up order which have given rise to cross-claims, *neither party can prove or sue for his full claim. An account must be taken and he must prove or sue (as the case may be) for the balance*." (Emphasis added)

120. In this court, upholding Hoffmann LJ, Dillon LJ said at 446:

> "If there are indeed mutual credits or mutual debts or mutual dealings between a company, or a bankrupt, and a creditor, then the set-off applies notwithstanding that one or other of the debts or credits may be secured."

121. He continued at 448:

> "If there is set-off between [the directors] and B.C.C.I. that must automatically reduce or extinguish the indebtedness to B.C.C.I. of the companies. The statutory set-off is not something which B.C.C.I. can, as it were, place in a suspense account. It operates to reduce or extinguish the liability of the guarantor and necessarily therefore operates as in effect a payment by him to be set against the liability of the principal debtor. A creditor cannot sue the principal debtor for an amount of the debt which the creditor has already received from a guarantor."

122. Insolvency set-off is mandatory. It is not a matter of choice. Indeed, parties to mutual dealings cannot contract out of it: *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785. In *Re Bank of Credit and Commerce International SA (No. 10)* [1977] Ch 213, it was argued that the court had an inherent power to disapply the rules about set-off. Sir Richard Scott V-C roundly rejected that argument. He said:

> "I do not accept that there is any such inherent power. The courts have, in my judgment, no more inherent power to disapply the statutory insolvency scheme than to disapply the provisions of any other statute."

123. The effect of equitable set-off on the form of judgment that the court enters is well-illustrated by the building contract case of *Hanak v Green* [1958] 2 QB 9. Mrs Hanak bought a house from Mr Green, who was a builder. He agreed to carry out certain works to the house for £800. She ordered some extra work to be done; but the works were not complete by the agreed date. Mr Green, on the other hand, said that the problems had arisen because Mrs Hanak had refused to give his workmen access. Eventually Mrs Hanak sued Mr Green, listing a number of items that she said had not been satisfactorily completed. Mr Green, in turn, set up a cross-claim claiming a quantum meruit for extra work done, loss attributable to the refusal of access, and damage to tools. The county court judge found that Mrs Hanak was entitled to £74 17s 6d; and Mr Green was entitled to £84 19s 3d. He entered judgment for Mrs Hanak for £74 17s 6d on her claim and also entered judgment for Mr Green for £84 19s 3d on his cross-claim. He gave Mrs Hanak the costs of the claim; and gave Mr Green the costs of the cross-claim. Mr Green appealed on the ground that his cross-claim was a set-off; and that he should have been awarded the costs of the whole action.

124. After a review of the authorities Morris LJ said at 23:

> "The position is, therefore, that since the Judicature Acts there may be (1) a set-off of mutual debts; (2) in certain cases a setting up of matters of complaint which, if established, reduce or even extinguish the claim, and (3) reliance upon equitable set-off and reliance as a matter of defence upon matters of equity which formerly might have called for injunction or prohibition."

125. He went on to say:

> "Reliance may be placed in a court of law upon any equitable defence or equitable ground for relief: so also any matter of equity on which an injunction against the prosecution of a claim might formerly have been obtained may be relied on as a defence. This may involve that there will have to be an ascertainment or assessment of the monetary value of the cross-claim which, as a matter of equity, can be relied on by way of defence. But this does not mean that all cross-claims may be relied on as defences to claims."

126. He then considered the nature of Mr Green's cross claim and decided that it fell within the category of cases which gave rise to an equitable set-off. That led him to the following conclusion at 26:

> "In my judgment, therefore, the defendant succeeded in defeating the claim of the plaintiff and in establishing his right to £10 1s. 9d. on the counterclaim. It becomes necessary to consider what is the fair order to make as to costs on this altered and different basis. I think that there should be judgment for the defendant on the claim with costs on scale 4: that there should be judgment for the defendant for £10 1s. 9d. on the counterclaim with costs on scale 2…"

127. In other words, the judge was wrong to have entered judgment for Mrs Hanak at all.

128. This court applied that reasoning in *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 1 WLR 501. In that case landlords claimed rent from the tenant; and the tenant counterclaimed for damages for breach of covenant for quiet enjoyment, which it also pleaded as a set-off. The quantum of the cross-claim exceeded the amount of the unpaid rent. The judge gave judgment for the landlords on the claim; and judgment for the tenant on the cross-claim. This court held that he was wrong to have done so. This court accepted the tenant's submission:

> "The judge ought therefore, they say, to have given judgment with costs for the tenants, in the landlords' action for rent, and judgment with costs for the tenants on their counterclaim in a sum representing the excess of the damages over the rent, with interest on that balance. An order in that form would produce a substantially more favourable result for the tenants, in terms not only of costs but also of interest."

129. The effect of the cases to which I have referred seems to me to be clear. Insolvency set-off is automatic (or "self-executing" as it is sometimes called). It affects the substantive rights of the parties; and will reduce or extinguish a debt. The claims exist for the purpose of quantification only. When it comes either to proving in the insolvency or suing in court, it is only the net balance which can be proved or recovered. If claim and cross claim are both litigated (and the cross claim amounts to a set-off), and the latter overtops the former, then judgment on the claim must be entered against the claimant and in favour of the cross claimant. It is wrong in principle to enter judgment separately on both claim and cross-claim.

130. I come now to *Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd* [2020] UKSC 25, [2020] Bus LR 1140. There were two issues before the Supreme Court: (1) did the insolvency of Bresco deprive the adjudicator of jurisdiction? (2) should an injunction be granted restraining the continuation of the adjudication? Like this court, the Supreme Court answered the first question "no"; but reversing this court, also answered the second question "no".

131. In the course of his judgment Lord Briggs observed that the adjudication regime was not simply concerned with cash flow. It had become an important method of alternative dispute resolution in its own right. In most cases the adjudication becomes

final because it is not challenged. The right to adjudicate is either statutory or contractual. It can be invoked at any time. The adjudicator's remit is a broad one. The process is speedy and, at least compared with litigation or arbitration, is cheap. The adjudicator will be an independent and experienced construction professional. Mr Constable QC submitted that the reason why 98 per cent of disputes culminate in an adjudicator's award and go no further is because it is widely known in the construction world that (save in exceptional circumstances) the court will summarily enforce the award. It is because the award is given teeth by the court's robust approach to enforcement, which results in one party actually parting with money in favour of the other, that the vast majority of disputes terminate at that stage.

132. In a section of his judgment beginning at [27] Lord Briggs considered the impact of insolvency set-off. At [29] he pointed out that "for some purposes the original cross-claims are replaced by a single claim for the balance"; and referred to *Stein v Blake*. He went on to say that:

> "Within the liquidation, *a net balance* owing to the creditor must be pursued by proof of debt in the ordinary way. The liquidator is entitled to be paid the full amount of any *net balance* owing by the creditor, and may exercise any available remedies for its quantification and recovery, including litigation, arbitration or ADR…" (Emphasis added)

133. At [30] he said:

> "If there is no dispute as to the existence and amount of the claims and cross-claims this is in practice a matter of simple arithmetic, the net balance being the difference between the aggregate of the claims and the aggregate of the cross-claims. But if any of the claims and cross-claims are in dispute, then those disputes will need first to be resolved, by reference to the individual merits of each, before the arithmetic resumes…"

134. He then went on to discuss the flexibility of the procedural means by which that quantification of the net balance may take place. There followed a discussion of the adjudicator's jurisdiction (in the course of which he approved *MS Fashions*); concluding that the insolvency did not deprive the adjudicator of jurisdiction. Thus, in agreement with this court, the cross-appeal was dismissed.

135. That left the appeal. It must be firmly borne in mind that the issue in the appeal was whether an injunction should be granted restraining the progress of the adjudication. That was the only issue that called for decision on the appeal. Anything else that Lord Briggs said about enforcement was obiter.

136. This court had decided that an adjudication would be a futile exercise. Lord Briggs disagreed. His first point, at [59], was that 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 would therefore be inappropriate to interfere with that right by injunction.

137. His second point, at [60], was that:

> "… adjudication has, as was always intended, become a mainstream method of ADR, leading to the speedy, cost effective and final resolution of most of the many disputes that are referred to adjudication. Dispute resolution is therefore an end in its own right, *even where summary enforcement may be inappropriate or for some reason unavailable*." (Emphasis added)

138. His third point, at [62], was that an adjudicator is better placed than a liquidator to quantify claims and cross claims in construction disputes. Thus he concluded at [63] that the adjudicator's resolution of the construction dispute referred by the liquidator may be of real utility to the conduct of the process of set-off within the insolvency process as a whole.

139. At this stage of his discussion it is clear that he disagreed with this court's description of the adjudication as futile. That was enough to dispose of the appeal. But he went on to consider the question of enforcement. As Mr Constable QC accepted, this part of Lord Briggs' judgment was obiter.

140. Lord Briggs said, at [64], that an adjudicator's decision "is unlikely to be summarily enforceable". In so saying, he referred with approval to the judgment of Chadwick LJ in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2001] 1 All ER (Comm) 1041. It is, I think, worth quoting what Chadwick LJ said at [35]:

> "In circumstances such as the present, 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 Insolvency Rules 1986 requires."

141. Lord Briggs continued:

> "… 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.
>
> [65] Furthermore it will not be in every case that summary enforcement will be inappropriate. There may be no dispute about the cross-claim, and the claim may be found to exist in a larger amount, so that there is no reason not to give summary judgment for the company for the balance in its favour. Or the disputed cross-claim may be found to be of no substance. Or, 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."

142. Having referred to some alleged difficulties, Lord Briggs concluded at [69]:

> "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 186 Con LR 148. 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."

143. There is, I think, no particular difficulty with most of what Lord Briggs said at [65]. If the net balance can be readily determined on a summary application then it is consistent with all the cases, both on equitable set-off and insolvency set-off, that judgment may be given for the balance. That may not, however, be the case where the adjudicator has decided the balance. The adjudicator's decision, while binding, is not a final decision. It is open to the court (or an arbitrator) to revisit the question of set-off. In that event the adjudicator's actual reasoning has no evidential or legal weight: *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] UKSC 38, [2015] 1 WLR 2961 at [32]. An award made by an adjudicator within his jurisdiction in a case not involving insolvency will be summarily enforced, even it is wrong: *Bouygues (UK) Ltd*. Since it has been said that the nature of adjudication is such that it is "likely to result in injustice" (*Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 at [14]); and the purpose of insolvency set-off is to do justice, there is, in my judgment, a real problem in entering judgment for the company simply on the basis of an adjudicator's rejection of a claimed set-off. Mr Constable met this point by the argument that the court must strike a balance between the default position that adjudicators' awards ought to be summarily enforced, and providing safeguards for the cross-claim. The difficulty with this argument, in my judgment, is that the application of insolvency set-off is not a discretionary matter.

144. There may also be a series of decisions by an adjudicator, arising at different stages of a contract which give an award one way in some cases, and in a different way in others. There may be cross-claims arising out of different contracts which have not been the subject of adjudication; or there may be cross-claims which are not contractual at all. In principle, insolvency set-off ought to apply across the board. Although Mr Constable began by submitting that an adjudicator's award ought always to be enforced, subject to the possibility of a stay of execution, he substantially modified his position by the end of the hearing. The refined argument was that an adjudicator's award ought to be enforced summarily where (a) it was a final account

net balance award and (b) there were no cross-claims which either arose out of different contracts, or which were not contractual cross-claims at all. Even then, it should only be enforced if safeguards were put in place to deal with a cross-claim, even if the adjudicator had rejected it.

145. In my judgment, this argument is also problematic, although it builds on what Lord Briggs said at [69]. In the first place, if the liquidator is only entitled to sue for the balance (as held in *Stein v Blake* and *MS Fashions*, and as Lord Briggs himself said at [29]) it is difficult to see how it is possible for a court to give judgment for a larger sum. Put simply, it goes beyond the company's entitlement. Second, to give judgment for a larger sum than the net balance amounts, in effect, to the disapplication of the statutory insolvency scheme. As I have said, the statutory scheme is not discretionary; and even contract cannot override it. There seems to be a debate in construction circles about whether the enforcement of an adjudicator's award is the enforcement of an underlying contractual obligation under the construction contract or is the enforcement of an express or implied term to comply with the award itself. But whichever of those views is correct, neither imbues an adjudicator's award with some elevated legal status. It is true that the adjudicator's decision is provisionally binding. But I cannot see a relevant distinction between that situation and one in which a fixed payment is due under a contract which is definitively binding. Insolvency set-off applies, as we have seen, even in the case of a secured debt. Third, despite having approved Chadwick LJ's observation that the mere fact of insolvency set-off is itself a "compelling reason" for refusing summary judgment, Lord Briggs went on to suggest that it might be done. Fourth, it cuts across the well-established approach of the court as held in *Hanak v Green*. In this connection, it must be borne in mind that, as Lord Hoffmann explained in *Stein v Blake*, "the law says that the account shall be deemed to have been taken and the sums due from one party set off against the other as at the date of the bankruptcy." Fifth, it is not easy to see what utility a judgment will have, if the judgment sum cannot be used in a distribution to creditors, or in payment of the expenses of the winding up. That is in sharp contrast to the adjudicator's decision, which may enable the final resolution of any dispute; and thus allow money to be placed at the liquidator's disposal. In some cases it may well be that entry of judgment would raise a *res judicata*, such that the quantum of the claim is finally determined as between the insolvent company and the creditor. But since an adjudicator's decision is necessarily provisional, it is difficult to see how a *res judicata* could arise out of such a decision.

146. One of the mechanisms to which Lord Briggs referred was the giving of "appropriate undertakings", referring to the decision of Mr Constable QC in *Meadowside Developments Ltd v 12-18 Hill Street Management Co Ltd* [2019] EWHC 2651 (TCC), [2020] Bus LR 917. In that case, Mr Constable said at [83] that the court could give judgment if there were sufficient safeguards in place. He continued:

> "[84] As near as possible, the safeguards must seek to place the responding party in a similar position to if the company was solvent. I recognise that it is unlikely that this would be wholly achieved. First, it is likely that should a responding party want to pursue its cross-claim in further litigation, it would likely be solely for the purposes of seeking repayment of any sum awarded, and it would be unlikely to benefit from a finding that

> it was the true creditor in the insolvency (other than to the extent of recovery of sums paid pursuant to the adjudication). Second, there would be an element of irrecoverable costs. Whilst this is the ordinary exigency of any litigation, this downside is more acute in litigation where the upside of success is limited by reason of the opposing parties' insolvency. Third, the requirement imposing a time limit in which the responding party must take steps to overturn the adjudication may involve a party bringing a claim earlier than the Limitation Act 1980 might otherwise have required it."

147. The undertaking that Mr Constable seems to have had in mind is an undertaking by the liquidator not to make a distribution for a specified period of time, with corresponding encouragement to the defendant to bring proceedings against the insolvent company: see [86] and [87] (3).

148. Where a liquidator intends to declare a dividend or make a distribution, he must give notice under IR 14.28. The notice will state that the liquidator intends to make a distribution and must also state the date by which proofs must be delivered. Notice of an intention to make a distribution must be given to all creditors who have not proved: IR 14.29. IR 14.30 provides that the notice must state the last date for proving; and that the liquidator intends to make a distribution within the period of two months from that date. If a proof is delivered late, the liquidator is not obliged to deal with it: IR 14.32 (2). If the liquidator makes a distribution, a creditor is not entitled to disturb it: IR 14.40. This is reflected in section 153 of the Insolvency Act 1986, which gives the court power to exclude a late proof "from the benefit of any distribution made before [the debt is] proved."

149. That does not, however, extinguish the creditor's claim for any balance. Once a company goes into liquidation, time ceases to run under the Limitation Act 1980. As Mellish LJ explained in *Re General Rolling Stock Company* (1871-72) LR Ch App 646, 650:

> "… the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against this claim, but, as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend."

150. If, therefore, judgment is given in the company's favour on the basis of a liquidator's undertaking not to distribute for a particular period of time, a subsequent distribution may well have the effect of precluding the application of insolvency set-off if there are insufficient undistributed assets remaining in the liquidation. As Hoffmann LJ put in *Stanhope Pension Trust Ltd v Registrar of Companies* [1994] 1 BCLC 628, 633::

> "The liquidator is entitled to distribute the assets in accordance with the rules and such distributions cannot afterwards be disturbed. In *re House Property and Investment Co Ltd*, in which a landlord tried unsuccessfully to require the liquidator

> of its original tenant company to set aside a fund to pay the rent if the assignee should default, illustrates all these principles very well. On the other hand, it is also a rule of winding up that a creditor may submit a proof or amend an existing proof at any time during the liquidation. The rule that prior distributions cannot be disturbed means that it may not do him much good, but in principle he is entitled to make his claim."

151. If the liquidator makes a distribution leaving insufficient assets to meet the creditor's cross claim, the creditor's claim will necessarily have to be treated as a separate and independent claim, rather than a reduction or extinguishment of the company's claim. If, on the other hand, the liquidator is precluded from making a distribution, it is difficult to see what utility summary judgment has. I do not therefore consider that Mr Constable's suggested solution is correct. Even if undertakings are given limited in time, there remains a real risk that that summary judgment will deprive a creditor of his right to security.

152. At [31] and [32] Lord Briggs compared the process of adjudication and the liquidator's assessment of a proof (including his assessment of any asserted set-off). Under IR 14.8 if a creditor is dissatisfied with the liquidator's decision in relation to his proof, he has a right of appeal to the court. But that appeal must be brought within 21 days: IR 14.8 (2). On an appeal, the court may decide the issue itself (if necessary with the aid of disclosure and cross-examination): *Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd* [2006] QB 808 at [11]; *Re BCCI (No 6)* [1994] 1 BCLC 450; *Law Society v Shah* [2007] EWHC 2841 (Ch), [2008] Bus LR 1742. Alternatively, it may permit separate proceedings to be taken (either in court or by arbitration) to establish the creditor's entitlement: *Cosco Bulk Carrier Co Ltd v Armada Shipping SA* [2011] EWHC 216 (Ch), [2011] 2 All ER (Comm) 481. But importantly, if a creditor fails to appeal within the stated time against a liquidator's decision, he cannot thereafter challenge that decision or assert his claim by way of set-off: *BCCI v Habib Bank* [1999] 1 WLR 42. There is, therefore, a mechanism within the Insolvency Rules for a liquidator's decision on a proof to become final. There is no equivalent for an adjudicator's award. Although in some respects, the processes are similar, there is, therefore, a very significant difference between the two.

153. As Lord Briggs pointed out, there is considerable procedural flexibility in the conduct of a liquidation. The flexibility should be used to ascertain the net balance (one way or the other). In my judgment, it is only once the net balance has been ascertained, by whatever are the appropriate means, that judgment should be entered.