

J A Ball Limited (in Administration) v St Philips Homes (Courthaulds) Ltd

10 February 2023

Introduction

Recently, the Technology and Construction Court (TCC) handed down an important judgment which clarifies and expands the law with regard to the circumstances in which the Courts will grant summary judgment of an adjudicator's decision or order a stay of execution in favour of a party who is insolvent.

In *J A Ball Limited (in Administration) v St Philips Homes (Courthaulds) Ltd* (citation to be confirmed), Browne Jacobson's Michael Sadler and Gavin Hoccom successfully represented St Philips Homes (Courthaulds) Limited (St Philips) in defending adjudication enforcement proceedings pursued by J A Ball Limited (in Administration) (J A Ball), a former main contractor.

In keeping with established principles, the TCC refused to enforce the adjudicator's decision because the adjudicator breached the rules of natural justice by determining the issues on the basis of a rationale in respect of which neither party had advanced in submissions, nor been invited by the adjudicator to address.

The Court also gave important guidance regarding the circumstances in which companies which are insolvent will be permitted to enforce an adjudicator's decision, and the availability of "ringfencing" as a form of security.

Background

St Philips entered into a construction contract with J A Ball in the form of an amended JCT Design and Build Contract 2016 (the Contract). The works involved the conversion of a commercial property to apartments for residential use (the Works).

Prior to completion of the Works, JAB appointed administrators. This constituted an insolvency event under the Contract with the consequence that no further sum would become payable to J A Ball until after completion of the making good of defects. Accordingly, St Philips employed third parties to complete the Works.

J A Ball asserted the employment of third parties constituted an unlawful termination of the Contract and that St Philips was liable to pay to J A Ball the balance of the contract sum. St Philips denied J A Ball was entitled to further payment, and instead a sum was payable by J A Ball to St Philips as damages under the Contract.

A dispute arose between the parties, which J A Ball referred to adjudication.

Adjudicator's decision

Although the adjudicator determined the Contract had not been terminated, he also determined that, contrary to the expression terms of the Contract, a balancing payment was payable by St Philips to J A Ball (the Decision). This was determined by reference to a rationale which neither J A Ball nor St Philips had advanced in submissions, nor been invited by the adjudicator to address.

St Philips refused to comply with the decision on the basis that in breach of the rules of natural justice, the adjudicator had "gone off on a frolic of his own".

The proceedings

J A Ball commenced adjudication enforcement proceedings with the benefit of funding in the form of a Damages-Based Agreement (DBA) provided by Pythagoras Capital Limited (Pythagoras).

St Philips defended the claim for enforcement both for the breach of natural justice set out above, and alternatively on the following bases:

- the starting point for a company in insolvent liquidation facing cross-claims or claims of set-off will generally not be entitled to enforce an adjudicator's decision;
- the inability of J A Ball to give "notice of distribution" declaring payment of a distribution or dividend to creditors meant there could be no doubt as to J A Ball's insolvency, and consequently, it should be treated the same as a company in insolvent liquidation and should not be entitled to enforce the Decision;
- alternatively, the enforcement of the Decision would deprive St Philips of security for its cross-claim for damages in circumstances where (1) J A Ball is in administration and pursuing the "secondary statutory objective" (i.e. to achieve a better return to creditors, rather than to be rescued as a going concern); and (2) there was no prospect of J A Ball being able to repay St Philips if St Philips was successful in any subsequent litigation in relation to the cross-claim; and
- alternatively, St Philips' funding arrangement was champertous (meaning the claim was no longer in the control of or being pursued for the benefit of J A Ball, but rather for Pythagoras) and an abuse of process, and the claim should be dismissed.

Breach of natural justice

In keeping with established principles, the Court agreed with St Philips that the adjudicator breached the rules of natural justice by determining the issues on the basis of a rationale which neither party had advanced in submissions, nor been invited by the adjudicator to address.

Consequently, the Decision was unenforceable and the claim was dismissed.

Position of company in administration is analogous to position of company in liquidation

The judge went on to consider what the impact of J A Ball's administration on the enforcement of the Decision would have been if there had not been a breach of the rules of natural justice. These findings are likely to be of wider interest, as they clarify some parts of what is a complex area of law.

The starting point is that a company in insolvent liquidation facing cross-claims or claims of set-off will generally not be entitled to enforce an adjudicator's decision (*Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] B.L.R. 522) because all claims and cross-claims should be resolved in the liquidation in accordance with the Insolvency Rules 1986 (Affirmed by the Court of Appeal in *John Doyle v Erith Contractors* [2021] EWCA Civ 1452), subject to certain exceptions established by the Supreme Court in *Bresco Electrical Services Ltd (in Liquidation) Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25).

An equivalent legislative provision does not apply to a company in administration unless and until the company gives a "notice of distribution", declaring payment of a distribution or dividend to creditors.

J A Ball's position was that because no notice of distribution had been given, the Decision was capable of enforcement.

St Philips' position, however, was that the inability of J A Ball to give notice of distribution meant there could be no doubt as to the company's insolvency and, consequently, it should be treated the same as a company in insolvent liquidation and should not be entitled to enforce the Decision. This position is consistent with *Straw Realisations (No.1) Ltd v Shaftsbury House (Developments) Ltd* [2010] EWHC 2597, a case decided in the High Court before *Bresco* and *John Doyle*. *Straw* also related to a company in administration where the administrators had yet to serve a notice of distribution.

The judge agreed and confirmed that *Straw Realisations* is good law in relation to the enforcement of adjudication decisions by companies in administration, because "...it is consistent with the underlying principle of preferring the insolvency regime to that of adjudication where justified on the facts". The judge noted that the principle established in *Straw Realisations* had to be modified according to the approach set out in *Bresco* and *John Doyle*, as follows:

- it is clear from Bresco and Doyle that even in the case of a liquidation, refusal of summary judgment is not inevitable as there may be fact specific circumstances that allow summary judgment; and
- the same must be said of an award in favour of a company which subsequently goes into administration, where again there is no hard and fast rule that an award will not be enforced in favour of a company in administration, and instead the policy of enforcing adjudication awards may have to be balanced against the insolvency regime, which affects all creditors.

This is a fact specific point and means that given the complexity of the greater proportion of corporate insolvencies, there is no hard and fast rule that can be applied to all situations.

Provision of security

The judge went on to consider the adequacy of J A Ball's proposals to provide security in accordance with the principles in *Meadowside*.

In support of J A Ball's position, the administrators offered to "ringfence" any payment made by St Philips in compliance with the Decision, and Pythagoras offered to guarantee St Philips' costs of proceedings to overturn the Decision.

St Philips' position was J A Ball's proposals were inadequate for various reasons, including that (1) the "ringfencing" of any payment would be futile because it would deprive St Philips of cashflow and would at the same time be unavailable for distribution to the creditors of J A Ball, and (2) the guarantee was unsatisfactory because it did not extend to the cost of litigating St Philips' cross-claim generally.

The Court agreed with St Philips. In relation to "ringfencing", the Court was satisfied St Philips would be able to satisfy any later judgment in favour of J A Ball and observed:

"I do not see the purpose for ordering the defendant to pay money over, only for it to be held in a ring-fenced account... the sterilisation of money in this way runs counter to the underlying philosophy of adjudication".

In relation to the guarantee, the Court observed:

"The guarantee is limited to the extent that the defendant's "proceedings are successful in overturning the Adjudicator's Decision." For that reason alone, the guarantee is inadequate... It does not give full costs protection to the defendant to the extent of the action it proposes to bring to defeat the claim based on the award".

Had the Decision not been unenforceable due to the breach of the rules of natural justice, the Court observed that, in part as a consequence of the issues in relation to the guarantee and ringfencing, he would have stayed execution for 6 months to enable St Philips to pursue its cross-claim.

ChamPERTY

The Court went on to consider whether Pythagoras' funding arrangement was champertous and an abuse of process, and, if so, the impact on the enforcement of the Decision if there had not been a breach of the rules of natural justice.

The courts have previously determined funding provided by Pythagoras to be champertous, though be unable to conclude whether it amounted to an abuse of process (*Meadowside*).

St Philips' position was the DBA was champertous and an abuse of process because the DBA did not comply with the Damages-Based Agreements Regulations 2013 (2013 Regulations) and even if successful, J A Ball would receive less than 50% of any sums paid by St Philips with the greater proportion being paid to Pythagoras (which meant the claim was no longer in the control of or being pursued for the benefit of J A Ball).

The Court agreed the DBA was champertous as a consequence of non-compliance with the 2013 Regulations because:

- the Court could not be satisfied Pythagoras would receive 50% or less of any payment recovered from St Philips (being the maximum permitted under the 2013 Regulations); and
- the DBA did not include adequate reasons to explain the basis on which Pythagoras' percentage recovery had been set.

Whilst the Court was not persuaded the DBA amounted to an abuse of process, it expressed "reservations arising from the fact that the funder is controlling the litigation due to its connection with Circle Law and its position as agent for the administrators" arising from the fact that J A Ball's funder and legal representatives are under common control.

Summary

The judgment confirms that, as a matter of policy, it is only in the most exceptional of circumstances that the courts will permit enforcement of an adjudicator's decision by a company in insolvency, or accept ringfencing as an adequate form of security for any cross-claim.

Further, the circumstances in which a company in administration may be granted permission to enforce an adjudicator's decision are limited to a situation where:

- no notice of distribution has been given and the adjudicator's decision has finally determined the issues between the parties (as per Straw Realisations), which in practice will be unusual because it will typically only arise by way of agreement or the operation of a contract (most obviously the NEC); and / or
- there are "exceptional circumstances", which may include where:
 - the decision concerns the final net position between the parties; and
 - the insolvent party seeking enforcement is able to provide security for the opposing party's cross-claim and the costs of that cross-claim.

This has implications for companies in insolvency and insolvency practitioners seeking enforcement of adjudicator's decisions, and may result in a return to the resolution of claims through the formal insolvency procedures designed for such purposes.

If you require assistance with issues arising from adjudication or adjudication enforcement, don't hesitate to contact us.

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