Adjudication Society

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TO ADJUDICATE OR NOT TO ADJUDICATE?

BRESCO IN THE SUPREME COURT

FUNDING ISSUES FOLLOWING

MEADOWSIDE

AMIT GUPTA

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By Zoom

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BRESCO IN THE SUPREME COURT

AMIT GUPTA

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What the *Legal 500* and *Chambers and Partners* say about him:

> ***"He is a polished advocate."***
>
> ***"He is brilliant in front of a judge."***
>
> ***"Approachable, knowledgeable and commercially aware. "***
>
> ***"Outstandingly responsive and academically superb, as well as a persuasive advocate. Extremely responsive and academically superb, he is a fierce advocate who is always willing to go the extra mile. Amit is very technical, excellent with clients and highly commercial."***
>
> ***"An extremely impressive junior who has established an excellent reputation in commercial litigation, demonstrating particular strength in insolvency matters."***

INTRODUCTION

1. I spoke to this society at the beginning of January 2020 on *Bresco* in the Court of Appeal. I expressed some scepticism about the practical usefulness of the decision but ultimately said there we were stuck with the decision unless and until it was overturned. The Supreme Court has now overturned it. This is one of the most significant decisions of the year, particularly because it bridges two significant and quite different industries.

2. In short, the Supreme Court concluded that:

   a. An adjudicator to whom a dispute is referred by a party in liquidation **does have jurisdiction** to determine the dispute, and

   b. **Such an adjudication is not futile** because, whether or not the decision will ultimately be enforceable, adjudication is a valid and useful form of ADR in its own right.

BACKGROUND

3. In 2015, Bresco became insolvent and entered into voluntary liquidation. Lonsdale's position was that Bresco had abandoned the project prematurely, resulting in the need to spend £325,000 on replacement contractors. In contrast, Bresco alleged it was owed £219,000 in respect of unpaid fees plus damages for lost profits.

4. In 2018, Bresco referred the latter claim to an adjudicator. Lonsdale objected on the basis that any such claim was cancelled out by Lonsdale's cross-claim by operation of insolvency set-off. Fraser J in the TCC granted an injunction halting the adjudication (accepting both of Lonsdale's jurisdiction and futility arguments).

THE COURT OF APPEAL JUDGMENT

5. Lord Justice Coulson gave the leading judgment and concluded that there was no absolute jurisdictional bar preventing an insolvent claimant commencing and pursuing an adjudication, however he found there existed a *"fundamental incompatibility"* between the adjudication regime on the one hand and the insolvency set-off regime on the other. As to the latter, while the adjudicator would have jurisdiction, the court held that an adjudication would be futile because it could never reach a position where the ultimate mutual account could be determined as a result of the adjudication. This, together with difficulties arising out of security, would mean that any adjudication decision in the circumstances would never be enforced:

"37. I consider that there is a basic incompatibility between adjudication and the regime set out in the Rules. The former is a method of obtaining an improved cashflow quickly and cheaply. The latter is an abstract accounting exercise, principally designed to assist the liquidators in recovering assets in order to pay a dividend to creditors. Rule 14.25 envisages the taking of a detailed account as between the company and the creditor, and the careful calculation of a net balance one way or the other, or quantifying the company's net claim against a creditor. By contrast, adjudication is a rough and ready process which Dyson J (as he then was) said in Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93 was "likely to result in injustice". They are therefore very different regimes."

THE SUPREME COURT

The remit

6. By virtue of the appeal and the cross-appeal, the same issues were before the Supreme Court. The Supreme Court judges were unanimous, with Lord Briggs giving the leading judgment; he summarised the dispute as follows:

"it is argued on this appeal that, if there are cross-claims between parties to a construction contract and one of them is in liquidation, then there can be no adjudication of any dispute between them about those cross-claims even if, but for the liquidation and the existence of cross-claims, one or more of those disputes would fall within the right to refer to adjudication conferred by section 108".

The jurisdiction argument

7. The argument was this: insolvency set-off replaces the former cross-claims with a single claim for the net balance meaning that there is no longer a dispute under the construction contract, so that the adjudicator's statutory jurisdiction is not engaged.

8. Rule 14.25 of the Insolvency (England and Wales) Rules 2016 provide as follows:

"14.25 Winding up: mutual dealings and set-off

(1) This rule applies in a winding up where, before the company goes into liquidation, there have been mutual dealings between the company and a creditor of the company proving or claiming to prove for a debt in the liquidation.

(2) An account must be taken of what is due from the company and the creditor to each other in respect of their mutual dealings and the sums due from the one must be set off against the sums due from the other.

(3) If there is a balance owed to the creditor then only that balance is provable in the winding up.

(4) If there is a balance owed to the company then that must be paid to the liquidator as part of the assets. ..."

9. The parties were in agreement that if Lonsdale had not had a cross-claim qualifying for insolvency set-off, the dispute referred by Bresco would have been within the adjudicator's jurisdiction, even though Bresco was by then in liquidation and the contract had ended.

10. The main cornerstone of Lonsdale's argument on jurisdiction was that the net claim was a dispute under the insolvency regime and no longer a dispute under the contract.

11. Lord Briggs was clear that he did not consider construction adjudication *"in any way incompatible"* with the insolvency regime. He rejected the notion that the dispute under the construction contract and any cross-claim ceased to exist such that they were immediately replaced by an insolvency claim. He held that such claims could not *"simply melt away so as to render them incapable of adjudication"*.

12. The law of insolvency set-off does not compel the liquidator *"to bring all disputes about the claims and cross-claims qualifying for set-off for resolution in a single proceeding"*. Instead, it was perfectly appropriate to *"untangle a complex web of disputed issues arising from mutual dealings between the company and a third party"*, including by adjudication. As a matter of insolvency law *Stein v Blake [1996] AC 243* was not authority for

the proposition that cross-claims which fall within insolvency set-off cease to exist for all purposes after the commencement of the insolvency. Lord Hoffman said in *Stein*:

> *"The cross-claims must obviously be considered separately for the purpose of ascertaining the balance. For that purpose they are treated as if they continued to exist."*

13. Accordingly, a party could still retain its rights as to dispute resolution, including adjudication.

14. In short, there was no incompatibility; if the mere existence of a cross claim (even if undisputed and however small) were to deprive a company of its right to adjudicate this would be "*a triumph of technicality over substance*".

The futility argument

15. The argument was this: even if there is jurisdiction, an adjudication in the context of insolvency set-off will not ordinarily lead to an enforceable award such there will be an exercise in futility that the court can and ordinarily should restrain by injunction.

16. Lord Briggs described the adjudication process as:

    a. Semi-compulsory;

    b. Not subject to exclusions of particular types of persons;

    c. Wide in jurisdictional terms;

    d. Speedy (given the strict time limits);

    e. Often cheaper than litigation and arbitration;

    f. Reliant on independent and often expert adjudicators, giving veracity to the process; and

    g. Whilst less reliable than litigation and arbitration, it was still subject to *de novo* determination.

17. Lord Briggs considered the fact that Bresco was in liquidation was not a sufficient reason to restrain the adjudication proceedings by way of an injunction. He said that the scheme introduced by the 1996 Act was *"conspicuously successful addition to the range of dispute resolution mechanisms available for use in what used to be an over-adversarial, litigious environment*" and went on to say that:

> *"...it is simply wrong to suggest that the only purpose of construction adjudication is to enable a party to obtain summary enforcement of a right to interim payment for the protection of its cash flow, although that is one important purpose. In the context of construction disputes 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..."*

18. In respect of injunctive relief, Lord Briggs said that the court may *"restrain a threatened breach of contract but not, save very exceptionally, an attempt to enforce a contractual right, still less a statutory right [e.g. right to adjudicate]"*. He considered that Lonsdale had failed to overcome what he described as *"that very steep hurdle"*.

19. Lord Briggs went on to say that:

> *"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."*

20. Lord Briggs also considered the potential burden on the TCC in dealing with such claims; it is a cost-neutral mechanism created by statute and simply because costs will be incurred in this does not mean that an

injunction preventing the exercise of a statutory right to adjudication is justified. He thought that the TCC could deal with the burdens.

21. In the round, the Supreme Court allowed the appeal so that the adjudication could proceed.

Where are we now?

Finality in practice?

22. Lord Briggs referred to a *"chorus of observations, from experienced TCC judges and textbook writers to the effect that adjudication does, in most cases, achieve a resolution of the underlying dispute which becomes final because it is not thereafter challenged."*

23. The Supreme Court thought that adjudication was not just a temporarily binding form of ADR helping to solve the cash flow problem in the construction industry and that should not be regarded as the sole objective of adjudication, but he did accept that *"when compared with arbitration and litigation, [adjudication's] speed and economy come at an inevitable price in terms of reliability"*.

24. In essence, many of the disputes ought to be resolved by adjudication and without the need to involve the courts.

The role of an insolvency practitioner

25. The Court of Appeal decision was seen as a noose around the neck of insolvency practitioners, being left to determine disputes themselves[1] (with or without potentially first obtaining expensive advice). The decision has been heralded by a number of commentators as a welcome decision for insolvency professionals, who will now look to utilise adjudication as a

[1] With a heavy risk that a disgruntled party would make an application to challenge that decision, with a real risk of an insolvency practitioner being criticised when the detail of such disputes is not ordinarily within their expertise (which the Supreme Court accepted).

quick and convenient route to determine claims in the liquidation of construction companies.

The (expanded?) role of the adjudicator

26. It is well-established that an adjudicator has jurisdiction to determine every point which may be advanced by the responding party; however, it is commonplace for adjudicators to refuse to deal with defences well outside the scope of the dispute referred to him/her (which may happen more often in insolvency because of the rules on set-off). Lord Briggs said:

> *"It is true that the effect of insolvency set-off may mean that cross-claims raise issues wholly outwith the purview of one or more construction contracts, such as the apportionment of liability for personal injuries, or liability under mutual dealings between the same parties in some other commercial field. In such a case the adjudicator will need to have regard to them, if they amount to a defence to the disputed construction claim being referred, but may have simply to make a declaration as to the value of the claim, leaving the unrelated cross-claim to be resolved by some other means. That is a remedy well within the adjudicator's powers. Nonetheless 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."*

27. The role of an adjudicator may well have expanded a little, but it should not become unwieldly.

The role of the TCC

28. The role of the TCC will again be more focussed on whether to grant summary judgment and/or a stay on enforcement, with greater emphasis on appropriate undertakings/security where there are insolvent companies and cross-claims: see *Meadownside v 12-18 Hill Street* [2019] EWHC 2651 (TCC).

M DAVENPORT BUILDERS LTD V GREER [2019] EWHC 318 (TCC)

29. In ***Davenport***, the court reminded the construction industry that in any case where there is a perceived risk of insolvency the employer should be scrupulous to protect itself by serving timeous Payment Notices or Pay Less Notices.

THE CONSTRUCTION INDUSTRY GENERALLY

30. Many industries have been hit hard by Brexit and COVID-19, including the construction industry. The quicker, cheaper and more-efficient way to determine such disputes has now been re-engaged; no doubt the industry welcomes this.

AMIT GUPTA

FUNDING ISSUES: AN UPDATE ON *MEADOWSIDE BUILDING DEVELOPMENTS LTD (IN LIQUIDATION) V 12-18 HILL STREET MANAGEMENT COMPANY LTD* [2019] EWHC 2651 (TCC)

MADELINE DIXON

Madeline specialises in both insolvency (corporate and personal) and property (including real property, and commercial and residential landlord and tenant disputes). She particularly enjoys cases concerning the crossover of the two fields.

INTRODUCTION

1. *Meadowside Building Developments Ltd v 12-18 Hill Street Management Company Ltd* [2019] EWHC 2651 (TCC) was an application for summary judgment to enforce an Adjudicator's Award ("the Award"). The Applicant ("Meadowside") was in liquidation and the application was made by the liquidator, acting by its agent Pythagoras Capital Ltd ("Pythagoras"). The decision post-dated the Court of Appeal judgment in *Bresco* but pre-dated the judgment of the Supreme Court.

WHY DOES MEADOWSIDE MATTER?

2. As set out above, the questions for the Court in *Bresco* were (i) does an adjudicator have jurisdiction to determine a dispute referred to him by the liquidator of an insolvent company where the respondent asserts the existence of a cross-claim and (ii) if so, is the referral of the dispute to adjudication an exercise in futility?

3. The Court of Appeal held that the answer to both questions was "yes": the Adjudicator did have jurisdiction, but referral of the dispute to adjudication would be an exercise in futility save in exceptional circumstances.

4. In *Meadowside,* the Court considered what circumstances might be "exceptional." However, the Supreme Court subsequently overturned the Court of Appeal decision in *Bresco.* It found that the Adjudicator did have jurisdiction, but that the referral of the dispute would not be an exercise in futility.

5. It nonetheless held that summary enforcement of an adjudicator's decision by a liquidator would normally be inappropriate for the reasons set out in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2001] 1 All ER (Comm) 1041.* Summary enforcement might, however, sometimes be available, either where there is (i) no dispute about the cross-claim/the adjudicator can determine the cross-claim or (ii) appropriate undertakings are offered by the liquidator, as discussed in *Meadowside.*

6. For that reason, the discussion in *Meadowside* as to funding arrangements and their impact on the enforceability by a liquidator of an adjudication award remains highly relevant, notwithstanding the Supreme Court's decision in *Bresco.*

WHY IS SUMMARY ENFORCEMENT UNAVAILABLE?

7. The reasons are explained in *Bouygues* at [29] – [35]. Firstly, all claims and cross-claims should be resolved in the liquidation, as required by r 4.90 of the Insolvency Rules 1986 (now r 14.25 of the Insolvency (England and Wales) Rules 2016)). There is a compelling reason to refuse summary judgment where a claim arises out of an adjudication and is therefore necessarily provisional.

8. Secondly, in normal circumstances, the respondent in an adjudication will be able to treat the applicant's claim under the adjudicator's determination as security for its own cross-claim. It loses that security where the applicant is in liquidation. In that case, when an amount awarded by an adjudicator is received by the liquidator it will form part of the fund available for distribution to the insolvent company's creditors. By contrast, the party with a cross-claim will be required to prove for its claim in the liquidation and will receive only a dividend pro rata to the amount of its claim.

MEADOWSIDE

The facts

9. The Respondent, 12-18 Hill Street Management Company Ltd ("HSMC"), had appointed Meadowside to carry out works pursuant to a JCT Minor Works Building Contract. Meadowside carried out the works but went into creditors' voluntary liquidation shortly afterwards. A dispute arose as to the sum due to Meadowside for the works, and the liquidator ("the Liquidator") appointed Pythagoras to act as agent in taking *"all steps to ascertain and recover amounts due to [Meadowside]."*

10. Pythagoras acts on behalf of various administrations and liquidators in relation to construction contracts. It had also acted for the liquidators in *Bresco.* It reviews company records, tries to ascertain whether any sums are due to the company in administration/liquidation under outstanding final accounts and, if it considers that sums are due, takes steps to recover them. It normally funds any litigation and then takes a pre-agreed percentage if sums are recovered. Pythagoras often uses the adjudication procedure since (i) it often results in a settlement without recourse to legal proceedings and

(ii) adjudication proceedings are not a reserved legal activity so Pythagoras can conduct the process by itself.

11. Crucially, while Pythagoras had disclosed the letter of appointment pursuant to which it was appointed to act as the Liquidator's agent to the Court, it did not disclose the terms of its appointment, including any terms as to its remuneration.

12. Pythagoras issued a Notice of Adjudication. HSMC asserted that the Adjudicator had no jurisdiction because Meadowside was in liquidation. It also asserted the existence of a cross-claim. Otherwise, it took no active part in the Adjudication.

13. The Adjudicator decided that he did have jurisdiction and went on to consider the dispute. He gave a detailed decision in which he considered HSMC's alleged cross-claim, and found that a sum of approximately £33,000 was due to Meadowside.

14. The decision in *Bresco* was handed down before Pythagoras commenced enforcement proceedings. In the course of correspondence between the parties as to the effects of *Bresco,* Pythagoras offered to guarantee:

    a. The payment of any adverse costs order against Meadowside in favour of HSMC should the summary judgment application be dismissed;
    b. The repayment of any sums paid following a successful enforcement of the Adjudication Award, should the award be overturned in legal proceedings issued by HSMC within 6 months thereafter; and
    c. The payment of any adverse costs order against Meadowside in favour of HSMC to the extent that the costs resulted from the Adjudication Decision being overturned.

15. Alternatively, Pythagoras suggested that the Award be ringfenced by the Liquidator for six months following payment of any sums by HSMC, coupled with ATE insurance to cover any adverse costs order.

16. Meadowside argued that the proposed guarantee/ringfencing rendered summary judgment in its favour appropriate. HSMC argued that the funding arrangements were champertous.

Exceptional circumstances

17. At [53], the Judge (Adam Constable QC) noted that:

> *"... the fundamental thrust of* Bresco, *which then ripples through the wider considerations, [is that] (1) A decision will not be enforced because, where there is a cross-claim, it would deprive the responding party of its security and bring finality by default to a temporary decision. This is fundamentally incompatible with the effect of Rule 14.25 which gives the responding party the right to security for its cross-claim and that right should not be removed."*

18. The "wider considerations" included the following: where summary judgment is granted in respect of an adjudication award in favour of a company in liquidation, the responding party would have to bring its own claim in court to overturn the decision. This gives rise to the following problems:

    a. Any recovery of the sum paid would be rendered difficult or impossible by the liquidation;
    b. Further costs would be incurred seeking to recover the sum; and
    c. Security for costs would not be available, as the responding party would be the claimant.

19. A case was likely to be exceptional, so that referral of a dispute to adjudication by a liquidator would not be an exercise in futility, in the following circumstances (see [87] of the judgment):

    1. The adjudication brought or to be brought determines the final net position between the parties under the relevant Contract;
    2. Satisfactory security is provided in respect of:
        a. Any sum awarded in the adjudication and successfully enforced, so that it is repayable should the responding party successfully overturn the decision in litigation or arbitration brought within a reasonable time of the date of enforcement;
        b. In respect of any adverse order for costs made against or agreed by the company in liquidation in respect of:
            i. Any unsuccessful application to enforce the adjudication decision; and
            ii. The subsequent litigation/arbitration, in which the responding party is seeking to overturn the adjudication decision;
    3. What is satisfactory security in form, duration and amount is a question of fact. It may be provided incrementally and a combination of the following solutions might be appropriate:
        a. The liquidator undertaking to the court to ringfence the sum enforced so that it is not available for distribution for the relevant duration;
        b. A third party providing a guarantee or bond;
        c. ATE insurance;
    4. Any agreement to provide funding or security cannot amount to an abuse of process.

20. As set out above, the Supreme Court in *Bresco* held that the referral of a dispute to adjudication by a liquidator is not an exercise in futility. However, the "exceptional circumstances" identified by Adam Constable QC in

Meadowside still provide useful guidance as to the circumstances in which summary judgment of an adjudicator's award in favour of a liquidator might be available: see *Bresco* at [67].

21. This means that it is essential to understand (i) when an agreement to provide funding or security will amount to an abuse of process and (ii) what is required for security to be adequate.

When will a funding arrangement amount to an abuse of process?

22. The short answer is as follows: where a funding arrangement is champertous it may amount to an abuse of process; the establishment of champerty may be an element of the abuse. However, the fact that a funding arrangement is champertous does not necessarily mean that the arrangement is an abuse of process. Whether any particular funding arrangement is abusive is always a question of fact.

Champerty

23. Champerty is often regarded as a variety of maintenance: *Factortame Ltd v Secretary of State for Transport, Local Government and the Regions (No. 8)* [2002] EWCA 932. A person will be guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse. However, there may be champerty without maintenance; the real concern is a policy against a person who is in a position to influence the outcome of litigation having an interest in that outcome: *Morris v Southwark London Borough Council (Law Society intervening)* [2011] EWCA Civ 25 at [54]. A champertous agreement is unenforceable by the parties to it.

24. The Judge in *Meadowside* held that the funding arrangement in that case was champertous, primarily because it failed to comply with the Damages-Based Agreements Regulations 2013. This requires some further explanation with reference to the underlying legislation.

The Damages-Based Agreements Regulations 2013

25. S 58AA(2) of the Courts and Legal Services Act 1980 ("CLSA 1980") provides that a damages-based agreement is unenforceable unless it satisfies the conditions specified by s 58AA(4) CLSA 1980. These conditions include a requirement that the agreement complies with such requirements as to its terms and conditions as may be prescribed: s 58AA(4)(c) CLSA 1980. Such requirements have been prescribed by the Damages-Based Agreements Regulations 2013 ("DBAR 2013").

26. S 58AA(3) CLSA 1980 provides that a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that –

    i. The recipient is to make a payment to the person providing the services if the recipient obtained a specified financial benefit in connection with the matter in relation to which the services are provided, and
    ii. The amount of that payment is to be determined by reference to the amount of the financial benefit obtained.

27. "Claims management services" has the same meaning as in s 419A of the Financial Services and Markets Act 2000 ("FSMA 2000"): s 58AA(7) CLSA 1990. That section provides that "claims management services" means advice or other services in relation to the making of a claim.

28. "Other services" includes –

    a. Financial services or assistance,
    b. Legal representation,
    c. Referring or introducing one person to another, and
    d. Making inquiries,

    but giving, or preparing to give, evidence (whether or not expert evidence) is not, by itself, a claims management service.

29. "Claim" means a claim for compensation, restitution, repayment or any other remedy in respect of loss or damage or in respect of an obligation, whether the claim is made or could be made –

    a. By way of legal proceedings,
    b. In accordance with a scheme of regulation (whether voluntary or compulsory), or
    c. In pursuance of a voluntary undertaking: s 419A(3) FMSA 2000.

30. "Proceedings" for the purposes of s 58AA CLSA 1990 includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated: s 58AA(7A) CLSA 1990.

31. In *Meadowside*, the Judge held that "proceedings" includes adjudication for the purposes of s 58AA CLSA 1980. Further, he found that Pythagoras was providing "advice or other services" to the Liquidator. Specifically, it was providing financial assistance in relation to the Liquidator's claim; this was at the heart of the services it was providing and that financial assistance had enabled the claim to be pursued. It was also providing advice and other services to ascertain and, if appropriate, recover the debt. Consequently, the claim was one to which the provisions of DBAR 2013 applied.

32. Pursuant to reg. 4(3) DBAR 2013, a damages-based agreement to which the regulations apply must not provide for a payment above an amount which, including VAT, is equal to 50% of the sums ultimately recovered by the client.

33. Pythagoras had not disclosed the percentage recovery agreed with the liquidator so the obvious inference was that it exceeded the permitted 50%. The agreement was therefore unenforceable. The Judge found that:

> *"The only logical conclusion to be derived from its unenforceability is that it is contrary to public policy and, in the eyes of the common law insofar as it must reflect public policy as developed, champertous"* (at [113]).

Abuse of process

34. Despite this, it did not follow automatically that the funding arrangement was an abuse of process. This was to be determined with reference to the following factors:

    a. The terms of the funding agreement between the litigant and his funder;
    b. Their relationship apart from that agreement;
    c. Whether or not (and if so how and in what circumstances) the litigant proposes to repay the funder;
    d. The relationship between the fund provided, the sum (if any) to be repaid and the sum at issue in the action; and
    e. The precise purpose within the proceedings for which the fund was provided.

35. In *Meadowside,* Adam Constable QC concluded that he did not have sufficient evidence to determine whether the funding arrangement amounted to an abuse of process. This was because the funding agreement itself had not been disclosed and so it was impossible to assess where the true balance of interests in the litigation lay.

36. As a result, he dismissed the application for summary judgment on the grounds that there had not been, and could not be, full argument on the abuse of process question.

37. He did, however, make the following statements which could provide more general guidance as to whether a specific agreement is abusive:

    a. It is essential to ascertain the percentage which the funder is due to receive from any sums recovered. Absent knowledge of the percentage the balance of interests between the funder and the funded cannot be determined;
    b. While not determinative, the absence of any pre-existing relationship between the funder and the funded could be an indicator for rather than against abuse of process;
    c. The specific arrangement for the timing of repayment is relevant. If sums recoverable were to be paid to the Liquidator immediately, net of Pythagoras' fee, immediately upon being realised after a successful enforcement then those funds would be available for distribution. Any interest in pursuing the subsequent litigation would be to ensure that the guarantee was not called upon, which would be in the interests of Pythagoras alone. Conversely, if no payment was to take place until any final determination then both the Liquidator and Pythagoras would retain an interest throughout. This might make the difference between a merely champertous and an 'abusive' arrangement.

When will security be adequate?

38. As set out above, this is a question of fact. However, the points set out below, as discussed in *Meadowside,* should be borne in mind.

39. Firstly, any guarantee should provide sufficient time for the responding party to issue proceedings seeking to overturn the Adjudicator's award. Six

months was sufficient on the facts of *Meadowside* but the complexity of the case needed to be taken into account.

40. Where the guarantee is not "ringfencing" but providing security that the sum paid over would be repayable at the end of litigation or arbitration, the guarantee must reflect the fact that it is offered in place of the security a debtor has in its cross-claim. As a result the guarantee should be from a bank or equivalent which provides a high degree of certainty that the guarantee will be called successfully.

41. There would also need to be a high degree of certainty that the guarantee would be made good in respect of security for costs. The Court should adopt a similar approach to that applied in a security for costs application.

42. Even if it were appropriate to look to a guarantee from the funder, the evidence provided by Pythagoras as to its financial position did not give the Court any real certainty that Pythagoras could meet its liabilities should the guarantee be called upon.

PRACTICAL CONSIDERATIONS

43. In reality, attempted enforcement of an adjudication award made in favour of an insolvent company is unlikely to succeed unless security is provided. Insolvency practitioners must take care to provide that any security offered is adequate. This is fact-dependent but the Court will require a high degree of certainty that any guarantee can be made good if called upon.

44. Care must be taken to ensure that funding arrangements are enforceable and do not amount to an abuse of process. Compliance with the DBAR 2013 is not the whole story. The terms of any arrangement must be carefully scrutinised to ensure that the funder's interest in the outcome of any adjudication or litigation is not too great.

45. Finally, the commercial reality must be borne in mind. Adjudication is a useful dispute resolution process but cases where it is appropriate to seek enforcement of an adjudicator's award are still likely to be rare. Only high-value disputes are likely to be worth pursuing.

This is not intended to be legal advice and should not be relied upon as such