Neutral Citation Number: [2019] EWHC 2651 (TCC)

Case No: HT-2019-000240

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 10/10/2019

Before :

MR ADAM CONSTABLE QC

- -

Between :

MEADOWSIDE BUILDING DEVELOPMENTS LTD (IN LIQUIDATION)	**Claimant**
- and -	
12-18 HILL STREET MANAGEMENT COMPANY LTD	**Defendant**

- -
- -

Helena White (instructed by **Blaser Mills LLP**) for the **Claimant**
Arthur Graham-Dixon (instructed by **Russell-Cooke Solicitors**) for the **Defendant**

Hearing dates: 25 September 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR ADAM CONSTABLE QC

MR ADAM CONSTABLE QC :

A. Introduction

1. This is an application for summary judgment to enforce a decision by an Adjudicator dated 3 April 2018, in the relatively modest sum of £32,629.63 (£26,629.63 plus VAT in respect of the Award and £5,637 plus VAT by way of the Adjudicator's fee and expenses). The party bringing the application is Meadowside Building Developments Ltd ('Meadowside'), a company in liquidation both at the time of the adjudication and now. At the time of the adjudication, in February 2018, the Defendant, 12-18 Hill Street Management Company Limited ('HSMC') did not substantively take part, on the basis that it contended that the Adjudicator lacked jurisdiction and the decision would be unenforceable. The application raises important points of principle which arise out of the Court of Appeal's decision in Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd; Cannon Corporate Ltd v Primus Build Ltd [2019] EWCA Civ 27.

2. This Judgment is in the following parts:

   A Introduction
   B Background Facts
   C Bresco: A Discussion
   D Bresco: is there an exception to the rule?
   E Champerty
   F Application of Principles
   G Conclusion

B. Background Facts

3. In light of the reliance by HSMC upon its non-participation in the Adjudication as prejudice, it is necessary to recite the background facts in a little detail.

4. Meadowside was appointed by HSMC in September 2014 to carry out certain internal and external repair works pursuant to a JCT Minor Works Building Contract 2011 ('the Contract'). Meadowside carried out the works and practical completion was certified on 20 March 2015. On 25 March 2015, the Contract Administrator under the Contract issued a certificate for payment valuing the Works in the gross sum of £162,531.07.

5. In July 2015, the Claimant was placed into voluntary winding-up. Michael Sanders and Georgina Eason of MHA MacIntyre Hudson were appointed as liquidators ('the Liquidators'). Prior to practical completion and the liquidation, various disputes had arisen, including in relation to interim payments, delay, variations and defects.

6. Under the Contract, liquidation engaged Clauses 6.7.2 to 6.7.4 automatically, by virtue of Clause 6.5.2. Clause 6.7.2 provides that no further sum is due, other than that due under Clause 6.7.4. Clause 6.7.3 states that following the completion of the Works and the making good of defects in them, an account shall be taken within 3 months thereafter set out in a certificate from the Contract Administrator or a statement prepared by the Employer. The statement prepared should identify:

> *'.1 the amount of expenses properly incurred by the Employer, including those incurred pursuant to clause 6.7.1 and, where applicable, clause 6.5.2.3, and of any direct loss and/or damage caused to the Employer and for which the Contract is liable, whether arising as a result of the termination or otherwise;*
>
> *.2 the amount of payments made to the Contractor; and*
>
> *.3 the total amount which would have been payable for the Works in accordance with this Contract.'*

7. Pursuant to Clause 6.7.3, if the sum of the amounts under clauses 6.7.2.1 and 6.7.3.2 exceed the amount stated under clause 6.7.3.3, the difference shall be a debt payable by the Contractor to the Employer or, if that sum is less, by the Employer to the Contractor.

8. It was not in dispute that any defects which HSMC regarded as necessary to be remediated following the works had been carried out, and that the time for rendering the account had passed. Mr Fletcher of Russell-Cooke, on behalf of HSMC, states that HSMC had not progressed any claims against Meadowside because doing so would have been pointless in the face of zero recovery.

9. For several years, HSMC engaged in sporadic correspondence with representatives of the Liquidators, Dennington Construction Consultants. There came a point when, as reported in the Liquidators' Report for the period from 23 July 2017 to 22 July 2018, Dennington considered that it had exhausted its efforts in pursuing HSMC.

10. On 27 September 2017, Meadowside's Liquidators appointed Pythagoras Capital Limited ('Pythagoras') to take over the pursuit of the debt, and their letter of appointment instructs Pythagoras to '*act as [the Liquidator's] agents and take all steps to ascertain and recover amounts due to [Meadowside]*'. Although a letter of appointment, it did not contain any terms as to the basis of remuneration or other terms. It is assumed, therefore, that some other commercial agreement must sit alongside the letter of appointment.

11. As explained by Mr McMahon, the managing director of Pythagoras, in his witness statement on behalf of Meadowside, Pythagoras is a company which acts on behalf of various administrators and liquidators in relation to construction contracts. Indeed, Pythagoras acted as agents for the liquidators in *Bresco.* Mr McMahon, an insolvency lawyer by background, explains in summary that when appointed as agent Pythagoras reviews what might be owed by considering the company records and, amongst other things, seeks to ascertain what sums are owed under outstanding final accounts. If Pythagoras establishes that monies are owed to the insolvent company, it takes steps to recover those sums on behalf of the company, and generally does so by funding the pursuit on behalf of the insolvent company because the insolvent companies are usually unable to do so. The availability of adjudication process is part of Pythagoras' business model. Mr McMahon states:

> "*Clearly the Adjudication procedure is incredibly useful in this regard. The issue of Adjudication proceedings often leads to an amicable settlement (during the Adjudication or after a decision*

> *is delivered)). It is also helpful because Pythagoras Capital can use its in-house legal and engineering/building expertise to run the Adjudication (Pythagoras is not a law firm, but Adjudication proceedings are not a reserved legal activity).*
>
> *If Pythagoras Capital makes a recovery for the insolvent company then it will keep a pre-agreed percentage*".

12. Pythagoras has not disclosed what percentage recovery its agency agreement gives rise to, although the Defendant has sought this information. This is said to be relevant to arguments raised by HSMC in relation to champerty.

13. On 30 January 2018, Pythagoras first wrote to HSMC, identifying itself as agent for the liquidator and providing its letter of instruction. In its letter it identified the Contract Administrator's certificates for payment and continued:

> "*The Contract Administrator has said that you (rather than the Contract Administrator) have raised various counterclaims. We would like to understand whether those counterclaims have any merit, and consequently, request that you send us … copies of all documents on which you rely in asserting that sums should be deducted from those owed by you to the Company and/or that the Company is indebted to you.*
>
> *…*
>
> *For the avoidance of doubt, we make this request pursuant to Section 236 of the Insolvency Act 1986. As you will no doubt be aware you have an obligation to comply with the liquidator's reasonable requests for information and documentation relating to the Company's affairs*".

14. On 15 February 2018, Pythagoras wrote indicating various issues that, if not agreed, would lead Pythagoras to assume that a dispute had arisen.

15. A Notice of Adjudication was issued on 29 February 2018 (incorrectly dated but no issue arises in relation to this). Declarations were sought relating to whether the two certificates for payment were the true and correct valuations of the Works, and whether Meadowside was entitled to be paid at least £171,585.49 for works completed under the Contract, or, if not, what sum Meadowside was so entitled to be paid.

16. After the appointment of the Adjudicator, and in response to a request from the Adjudicator, Pythagoras wrote (copied to HSMC) undertaking to discharge any liability on behalf of Meadowside in respect of fees, in respect of which it accepted that Meadowside and HSMC had joint and several responsibility.

17. By letter dated 6 March 2018, Russell-Cooke responded, copied to the liquidators, raising questions about the capacity in which Pythagoras was acting and its interest, concerns about the propriety of the preceding letter citing section 236 of the Insolvency Act 1986, and referring to the decisions in Bouygues (UK) Limited v Dahl Jensen (UK) Limited [2000] EWCA Civ 507; [2000] BLR 522and Enterprise Managed Services Ltd

v McFadden Utilities Ltd [2009] EWHC 3222 (TCC) which provided '*clear and longstanding authority about the incompatibility of adjudication in the context of liquidation*'. HSMC reserved the right to seek appropriate declaratory relief from the Technology and Construction Court in respect of, without limitation, the enforceability of any adjudication commenced by Meadowside. Pythagoras was asked to have the Liquidator provide details of the solicitors instructed to accept service of Court proceedings. No proceedings for declaratory or injunctive relief were commenced.

18. In the exchange which followed, Pythagoras argued that the cases relied upon did not deprive an adjudicator of jurisdiction, making clear that although Bouygues demonstrated that the Court had a discretion not to enforce awards, this was a question of discretion rather than jurisdiction.

19. On the same day, Russell-Cooke identified to the Adjudicator its concerns which included, '*the fact that it is being brought by a company in liquidation. Our client is therefore necessarily reserving its position, including in respect of your appointment, terms and jurisdiction, and whether it will participate in this adjudication*.'

20. On 14 March 2018, Russell-Cooke provided lengthy submissions by letter to Pythagoras arguing that the Adjudicator had no jurisdiction. In the same letter, it made clear that it considered that there was no net balance due to Meadowside under Insolvency Rule 4.90, and that, indeed, it considered itself to be a creditor of Meadowside on account of its cross-claims under the Contract. These consisted of liquidated damages, the cost of completion, additional costs caused by the termination, and previous claims which had been accepted, it was said, including such things as the cost of inspections and remedial works. Pythagoras was invited to withdraw the adjudication. The reservation in relation to declaratory relief was repeated.

21. Russell-Cooke copied this letter, and the preceding correspondence with Pythagoras, to the Adjudicator. The letter summarised HSMC's concerns and invited the Adjudicator to resign. Stating that HSMC did not accept his jurisdiction, Russell-Cooke indicated that HSMC would not be participating in the adjudication and would not accept liability for his costs. Russell-Cooke also confirmed that '*HSMC does not ask you to give a non-binding (or binding) decision on your jurisdiction'.*

22. Notwithstanding the identification of an apparent conflict between the request to resign and the absence of an invitation to investigate (in a non-binding way) his jurisdiction, the Adjudicator went on to consider the matter, and determined that he had jurisdiction in his letter, also on 14 March 2018. The Adjudicator noted that HSMC did not intend to participate, but also noted that Section 3 of the copied letter in which Russell-Cooke had identified the substance of its cross-claims in justification of the position that, pursuant to Clause 4.90, no net balance was due to Meadowside. The Adjudicator then stated that '*…since … it seems reasonable to presume that the Respondent will not be making any further submissions, I propose to treat the content of its letter to [Pythagoras] as its Response in these Proceedings.'*

23. By email dated 15 March 2018, Mr McMahon confirmed his understanding that the Contract being the subject of the Adjudication was the only dealing between the parties. HSMC was invited to respond. It did not do so. It has not been suggested in relation to this application that there were any other mutual dealings between the parties other than those arising out of the Contract.

24. The following day, the Adjudicator asked Pythagoras to confirm specifically, via a written statement from the Liquidator, '*whether or not [HSMC] has proven, or has claimed to prove, for a debt in the liquidation*'. The Adjudicator also asked for an explanation as to why the time for preparation of the Clause 6.7.3 account had now arisen, and why the account had not been prepared by the Contract Administrator; and to provide '*such detail as was available to support the Contract Administrator's (apparently entirely unsubstantiated) view that the value of the work undertaken by the Referring Party was £171,585.49.'*

25. The following day, Russell-Cooke wrote to Pythagoras, copied to the Liquidator but not the Adjudicator, re-asserting its position that it was a creditor to Meadowside, and that it had not, to date, submitted any formal proof of debt in Meadowside's liquidation in light of its client's understanding that there would be insufficient asset realisations to permit any dividend payable. Russell-Cooke concluded by repeating its request that the adjudication be abandoned, and stating that in the event that the Adjudication led to its client defending enforcement proceedings and/or seeking appropriate declaratory relief, it would refer to the correspondence on the issue of costs.

26. On 19 March 2018, Pythagoras provided to the Adjudicator (copied to Russell-Cooke) a letter from the Liquidator confirming that HSMC had not lodged a proof of debt in the liquidation. It did not provide to the Adjudicator a copy of Russell-Cooke's letter of 17 March 2018. Pythagoras also sought to explain that, '*it is clear from our discussions with the Contract Administrator had he did not feel able to issue a clause 6.7.3 certificate because the Responding Party would not accept his opinion (and no doubt kept raising various alleged, but unsubstantiated, contra charges). It should also be noted that the Contract Administrator is still owed outstanding fees by the Responding Party in relation to this project.'*

27. HSMC was invited to respond to the further information provided by Pythagoras, but there was no further substantive communication from HSMC in the Adjudication. When Pythagoras indicated it did not intend to serve a Reply '*since there was nothing to respond to*', the Adjudicator corrected Pythagoras, repeating his intention to treat the letter of Russell-Cooke setting out the substance of the claims it said justified a net balance under Clause 4.90 being owed to it as the Response.

28. On 3 April 2018, the Adjudicator published his Decision. In it, the Adjudicator determined that he needed to determine the balance payable under each of the elements of Clause 6.7.3, in order to determine what sum was due, if any, under Clause 6.7.4. In doing so, the Adjudicator determined, with a great deal of care, what he considered to be due. He allowed full liquidated damages to HSMC (£19,500), notwithstanding their non-participation, in the absence of any jurisdiction within the Notice of Adjudication to determine an extension of time; he declined to award the costs claimed dealing with defects and other matters in Russell-Cooke's letter of 14 March 2019 because of the absence of substantiation; and he rejected Pythagoras' primary case as to the proper value of the works, deciding instead to take the value as had been certified in Interim Certificate 6 together with the stated value of remaining work (in light of the fact of the practical completion certificate). A net balance to Meadowside of £26,629.63 was found to be due.

29. It is not in dispute in these proceedings that the Adjudication was an attempt to arrive at a net balance of the sums due between the parties.

30. Following the Adjudication, correspondence between Pythagoras and Russell-Cooke ensued in relation to the threat of enforcement by Pythagoras. Before Pythagoras took steps to commence enforcement proceedings, the judgment in Bresco at first instance was handed down ([2018] EWHC 2043 (TCC)). This found that an adjudicator did not have jurisdiction where the referring party was in insolvent liquidation. As Mr Fletcher points out at paragraph 41 of his witness statement, the reasoning of Fraser J in respect of jurisdiction was similar to the arguments which had been deployed by Russell-Cooke in correspondence.

31. On 24 January 2019, the Court of Appeal handed down judgment in the appeal in Bresco. As discussed further below, the argument that an adjudicator had no jurisdiction was overturned, but the decision to grant injunctive relief to prevent the adjudication from continuing was upheld.

32. Arguments then proceeded between the parties on the effect of Bresco. In the context of these discussions, on 4 March 2019, Pythagoras proposed what has become called the 'Pythagoras Capital Guarantee'.

33. This was stated in the following terms:

> "*To mitigate the above perceived theoretical risk to your Client (that it may consider the insolvency of Meadowside to effectively make enforcement proceedings futile), and as a condition of securing the ability to summarily enforce the Adjudicator's Award, Pythagoras Capital Limited will guarantee any liability (which we see as unlikely) Meadowside might incur to you if unsuccessful in the enforcement proceedings or if you choose to overturn the Adjudicator's decision by issuing proceedings, Pythagoras Capital Limited undertakes to guarantee the Claimant on the basis that: to the extent that your Client issues proceedings within 6 months of Meadowside's successful summary enforcement and, having done so, successfully overturns the Adjudicator's Award, Pythagoras Capital Limited guarantees payment to your Client of such sums as the Court may determine (limited as a maximum to the amount paid by your Client pursuant to the Adjudicator's decision) and will also pay your Client's reasonable and proportionate legal costs of such proceedings (to be assessed if not agreed).*
>
> *Furthermore, if your Client successfully defends the summary judgment proceedings, we agree to guarantee payment of any adverse costs order made against Meadowside.*
>
> *We are content to provide the first guarantee now, as a condition of your Client making payment voluntarily within 14 days and that the undertaking will also be given, as above, and effective to the extent that proceedings to overturn the Adjudicator's decision are issued within 6 months of the date of such voluntary payment.*"

34. By a letter dated 5 August 2019 Pythagoras Capital provided an amended version of the Pythagoras Capital Guarantee, which stated:

> "*3. … as a condition of securing the ability to summarily enforce the Adjudicator's Decision, Pythagoras Capital Limited hereby guarantees:*
>
> *a. the payment of any adverse costs order against the Claimant in favour of the Defendant in the event that this application for enforcement of the Adjudication Decision is unsuccessful;*
>
> *b. the repayment of any sums paid following a successful enforcement of the Adjudication Award should the Defendant issue proceedings within 6 months thereafter and, having done so, overturns the Adjudication Award (to the extent to which the Adjudication Award is overturned); and*
>
> *c. the payment of any adverse costs order against the Claimant in favour of the Defendant (to the extent that those costs resulted from the Adjudication Decision being overturned).*
>
> *4. Pythagoras Capital guarantees payment of such adverse legal costs above to the Defendant to be assessed if not agreed.*"

35. The adequacy and effect of the Pythagoras Capital Guarantee is considered further below. After enforcement proceedings were commenced and HSMC continued to allege that there existed inadequacies in the Pythagoras Capital Guarantee, and in Pythagoras' standing to make it good (which matters are disputed), a separate solution of ringfencing the Adjudication Award coupled with the provision of ATE insurance in respect of an adverse costs order was raised. This was offered in the Second Witness Statement of Mr McMahon in the following terms:

> "*Should the Court think fit, the Claimant would be agreeable to the Adjudication Decision being enforced on condition that:*
>
> *a. the liquidators of the Claimant ringfence any sums paid by the Defendant as a result for a period of 6 months and, should the Defendant issue proceedings within those 6 months to overturn the Adjudication Decision, until those proceedings by the Defendant are concluded. Those monies shall be repaid to the extent that the Defendant successfully overturns the Adjudication Decision; and*
>
> b. *the enforcement is temporarily stayed until such time as the Claimant puts an insurance policy in place as described above."*

36. The potential insurance policy was described as operating as follows:

> '*a. A Claimant (being an insolvent creditor), for whom Pythagoras Capital acts as agent, obtains a successful Adjudication decision and successfully applies for enforcement of that decision;*

b. *within a certain time frame (say 6 months), the Defendant issues proceedings to overturn the Adjudicator's decision;*
c. *the Defendant is wholly or partially successful in overturning the Adjudicator's decision.*

In those circumstances, the policy will cover any adverse costs order that a Defendant might obtain against the Claimant (to the extent that those costs resulted in the Adjudication decision being overturned).'

37. In oral submissions, the position was developed such that the potential of ringfencing could be adopted as part of a solution either with a guarantee or ATE insurance. There is no formal draft guarantee or prospective insurance policy (or identified insurer) before me.

C. Bresco: A Discussion

38. In Bresco, the Court of Appeal considered conjoined appeals raising important issues as to the interplay between the construction adjudication process, on the one hand, and the insolvency regime, on the other. The tension between the two regimes remains central to the issues in this case. It is said by Mr Graham-Dixon, for HSMC, that Bresco is a complete answer to the present application. By contrast, Ms White for Meadowside contends that in circumstances where the concerns raised by Coulson LJ in Bresco have been effectively met, a party is able to bring itself into an 'exception' from the normal rule that an adjudication award in favour of a party in liquidation will not be enforced and therefore the conclusion that adjudication is futile is no longer appropriate.

39. It is plain that the decision in Bresco settled the argument about whether the fact of insolvency effectively removes the otherwise existing statutory right to adjudicate altogether, by depriving an adjudicator jurisdiction to determine any claim. The Court determined that there is no reason why, purely as a matter of jurisdiction (as opposed to utility), a reference to adjudication should be treated any differently to a reference to arbitration. If the underlying claim exists for the purposes of arbitration, it exists for all purposes. The temporarily binding nature of the decision cannot mean that the underlying claim is extinguished, neither can the choice of forum dictate whether the claim has been extinguished. Thus, the fact that pursuant to Rule 4.90, or what is now Rule 14.25, of the Insolvency Rules the claim under the Contract was replaced with a single right to claim the balance (if any) arising out of the mutual dealing and set-off between the parties did not, of itself, deprive Meadowside from the right to refer a dispute to adjudication pursuant to the contractual regime.

40. Thus, the question of jurisdiction was distinguished from the question of utility. The court concluded in the Bresco appeal, as summarised at paragraph 63:

> "*In the circumstances of this case, an adjudicator's decision in favour of Bresco, a company in insolvent liquidation facing a separate cross-claim, will not be capable of being enforced. That would make the adjudication an exercise in futility. In accordance with Twintec, an injunction was therefore appropriate. There was no reason why this adjudication should have been permitted to continue; on the contrary, it was just and convenient to grant the injunction. Accordingly, I would uphold the decision of Fraser J, not on the grounds of theoretical jurisdiction, but on the grounds of practical utility.*"

41. In Primus, the Court at first instance was not dealing with a company in liquidation, but with a company in a CVA, seeking to trade its way back out of difficulties and to avoid liquidation. The decision to grant summary judgment and refuse a stay was upheld by the Court of Appeal.

42. It is necessary, before turning to the facts of this case, to identify the relevant passages of Bresco, which were the subject of helpful written and oral submissions upon this application, in which Coulson LJ set out the reasoning behind his conclusion that, in that case, adjudication was a futile exercise and that it was appropriate to grant an injunction to prevent the adjudication from proceeding. In doing so, it needs to be kept in mind that in Bresco, as in this case, the Court is considering the exercise of a discretion. In Bresco, that related to the granting of injunctive relief to prevent the adjudication from proceeding; in this case it is whether there is a compelling reason not to grant summary judgment or, if there is not, in any event whether to grant a stay of execution. It is no doubt because the exercise of discretion is fact sensitive that the Court of Appeal did not suggest that the extent of incompatibility between insolvency and adjudication – both statutory regimes – was such that there would never be a situation in which an adjudication may be permitted to proceed and/or be enforced. Indeed:

(1) At paragraph 36, and in the following paragraphs, it is clear that the Court was '*focus*[ing] *on the utility (if any) to be derived from the adjudicator's theoretical jurisdiction, where the claiming company is in insolvent liquidation and the responding party has a cross-claim'*. This, indeed, is often the position at the end of a construction contract where both employer and contractor will have claims against each other. However, implicit is the suggestion that if no cross-claim existed (so the only exercise was the valuation of the insolvent contractor's claims), different considerations might well apply to the consideration of the utility of the exercise;
(2) At paragraph 54, the Court acknowledged that Bresco applied in the 'ordinary' case, and that it may be in '*exceptional*' circumstances, a company in insolvent liquidation (and facing a cross-claim) could refer a claim to adjudication, succeed in that adjudication, obtain summary judgment and avoid a stay of execution. By definition, therefore, the prohibition is not absolute. The question for this Court is to consider whether exceptional circumstances arise in the circumstances of this case.

43. In paragraph 37 of Bresco, Coulson LJ commences with the observation that:

> *'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.'

44. Paragraph 38 then suggests that the incompatibility can be seen in (a) the different processes each regime entails, (b) in a comparison of the results that may be available and (c) in the consideration of the wider issues that could arise if companies in insolvent liquidation regularly sought to refer claims to adjudication. It is thus the detailed reasoning in paragraphs 39 to 60 that supports the broad observation in paragraph 37. I therefore turn to consider each area in which the incompatibility is discussed.

45. *The Process*. At paragraph 39, Coulson LJ observes that the vast majority of claims which are referred to adjudication are not ostensibly claims for a net balance of the sort envisaged by Rule 14.25. The example then given in paragraphs 40 and 41 is of the '*smash and grab*' adjudication, based upon an entitlement to payment caused by a technical failure on the part of (generally) an employer to serve a required notice. At the end of such an adjudication, the parties are no more enlightened as to the true value of the account between the parties than they were at the beginning. It is difficult to think of a process less consistent with the net balance assessment under the Rule 14.25 regime in insolvency, and the injustice which would follow if enforcement of such a position became, by reason of the referring party's liquidation, the final position by default is obvious.

46. In Enterprise, quoted at paragraph 21 of Bresco and referred to specifically in this section of Coulson LJ's judgment dealing with process, the adjudicated claim fell somewhere in between a 'smash and grab', and a full determination of mutual dealings. The fact that the claim '*would relate just to an element of the chose in action*' was plainly relevant in the determination, in that case, that the adjudication decision was unenforceable. The rationale was that, absent agreement between the parties, it would not be in accordance with the Insolvency Rules for the calculation of the net balance under Rule 4.90, or the 14.25 equivalent, to be performed in what might be a piecemeal or hobbled fashion.

47. Of course, the Contract itself, which permits adjudication on any dispute at any time, might be thought to be such an agreement between the parties, and neither the statutory nor contractual right to adjudicate is expressly curtailed upon liquidation of a party (which could always have been a part of the statutory scheme, but is not). Many JCT forms provide, as did the one in this case as set out above, that no further payment is due to the Contractor following termination for default, other than the 'net balance' following the assessment pursuant to Clause 6.7.3, which is analogous to the Rule 14.25 assessment at least as far as that particular contract is concerned. It could be argued that, in light of this contractual scheme, any piecemeal and hobbled adjudication process following termination for default would be not in accordance with the contractual provisions for determining the account between the parties in these circumstances (quite irrespective of the question of insolvency). But, unless the issue of insolvency is involved, it is improbable that use of piecemeal adjudications to determine that account would be effectively prohibited. This perhaps suggests that the conversion of the parties' entitlement to a single net payment, as happens following termination for default in any event, is not of itself the driving issue.

48. What is plain, however, is that in considering the exercise of discretion, the usefulness of the adjudication itself, following liquidation, will be an important factor; and that the perception of usefulness will be, at the very least, shaped by the fact that the parties' substantive rights have been changed by reference to the Rule 4.90 principles.

49. In the present case, there is no dispute that the adjudication was, in effect, dealing with the substance of full extent of the parties' mutual dealings. It is at the opposite end of the scale to the 'smash and grab' adjudication. It therefore comes as close as it is possible to come to a process which the parties would have to undertake in the liquidation in any event. This is plainly to be distinguished from the type of case considered in Bresco. I note that, in Indigo Projects London Limited v Razin [2019] Bus LR 1957, Sir Antony Edwards-Stuart sitting as a High Court Judge identified the same distinction, and appreciated that the type of adjudication which seeks a determination of the entirety of the account is atypical. Referring to Coulson LJ at paragraphs 43-45 of Bresco, Sir Antony Edwards-Stuart said:

> "*It is important to appreciate that in these passages Coulson LJ was contemplating a typical adjudication which only involves certain limited issues in dispute between the parties, rather than the (fairly rare) adjudication which deals with a contractor's final account and covers all the matters in issue between the parties. Such a decision would determine, albeit on an interim basis, the entirety of the dispute between the parties*".

50. In her written submissions, Ms White suggested that this fact of itself is sufficient to render this claim 'exceptional' and to justify enforcement. I am in no doubt that this puts the case too high, as it deals with only one of the problems that gives rise to incompatibility. However, it is right in my judgment that the closer the adjudication becomes to a process in which the net balance between the parties is determined, the less force the objection raised in paragraphs 39 to 42 of Bresco has, and the more likely it is that (if other objections are addressed successfully), the company in liquidation may take itself out of the ordinary position.

51. Mr Graham-Dixon makes the point that it would be wrong to carve out a final account dispute, as an exception to *Bresco* position, because, although it is the closest in nature to the type of assessment of the overall net position with which a liquidator would be concerned, it is also the type of adjudication which is, by reason of its all-encompassing nature, particularly susceptible to placing the 28 day adjudication regime under strain; and therefore is where the highest risk of injustice lies. The first difficulty with this submission is that, if correct, it would tend to suggest that – contrary to the position taken by the Court in *Bresco* – there is in reality no possible exception to the incompatibility between adjudication and insolvency: the subject-matter would be too remote from the Rule 14.25 process; or it would be too similar and therefore too complex. I do not read this into Bresco, which is plainly concerned in this section with a lack of utility derived from the disparity between the subject matter of a particular adjudication and the real issue between the parties following liquidation. The second difficulty is that the particular concern expressed in relation to injustice needs to be seen through the lens of de facto 'finality' of the ordinary case of a company in liquidation. The potential (temporary) injustice occasioned by the difficulty of a complex final account dispute in 28 days applies to any such adjudication; the particular issue where a company is in liquidation is the de facto finality of the decision

where no safeguards are in place to maintain the temporarily binding nature of adjudication. If the latter is dealt with sufficiently, the former is no more or less than the potential 'injustice' to any party facing a final account adjudication.

52. *The Result.* In paragraphs 43 to 46, Coulson LJ looks at what might happen if a company in insolvent liquidation was entitled to the sum found due by the adjudicator, but where the responding party has a cross-claim. In short, upon enforcement, the responding party would be left to prove its cross-claim in the liquidation, and would only receive a dividend. The effect is that it would be deprived of the benefit of treating the referring party's claim as security for its own cross-claim. It is for this fundamental reason that, '*ordinarily, summary judgment to enforce the adjudicator's decision would not be available*' (para 43), as had been stated by Chadwick LJ in Bouygues.

53. It is within this section that the fundamental thrust of Bresco, which then ripples through the wider considerations, is at its clearest. (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. (2) If the decision arising out of the adjudication will not be enforced, the adjudication is an '*exercise in futility*'. It is then the fact of futility upon enforcement that colours the wider considerations.

54. In quoting HHJ Purle's observation in Philpott & Another v Lycee Fancais Charles De Gaulle School [2015] EWHC 1065 (Ch) that it was '*inconceivable*' that any adjudicator's decision in favour of a company in insolvent liquidation would be enforced, Coulson LJ thought '*this may put it too high*'. That is support for the fact that the rule was not absolute, but one of the Court's discretion and that there may be exceptional circumstances. However, it seems to me that the exception is most likely to exist, therefore, where this fundamental difficulty is addressed. Where the basic reason for lack of enforceability is eliminated, the removal of a company's statutory and contractual rights to adjudicate is more difficult to justify.

55. So, in circumstances where there is a satisfactory guarantee in relation to any sum awarded, and/or in circumstances where the sum is temporarily ringfenced pending its becoming finally due in either further proceedings or as a result of the responding party choosing within a period of time not to seek to overturn the adjudicator's decision, the mischief which is at the heart of the justification for not enforcing is eliminated. The responding party retains the security for its cross-claim. Even where there is no cross-claim, it seems to me such security is likely to be needed to permit a company in liquidation to enforce, so as to prevent the usual application of the principles in Wimbledon Construction Company 2000 Limited v Derek Vago [2005] BLR 374 (which do not depend upon the existence of a cross-claim to apply).

56. It is right, of course, that as a consequence of enforcement the onus would be on the responding party to take steps to justify its substantive entitlement to that security, and issues arising out of this were addressed in Bresco under 'Wider Considerations'. I address the Wider Considerations identified by the Court of Appeal below. However, taken in isolation, it seems to me that it is possible by the provision of adequate security to address the fundamental concern that enforcement would, in the ordinary position (without security) automatically deprive the responding party of its entitlement in relation to its cross-claim under the statutory insolvency regime. That is the

fundamental incompatibility, and where that incompatibility remains, it is clear that the rights under the insolvency regime prevail. The exercise of discretion is a much more nuanced decision where that principal problem has been addressed by the provision of satisfactory security.

57. *Wider considerations.* In paragraphs 47 to 53, Coulson LJ set out a number of wider considerations. In considering these in Bresco, Coulson LJ was (by definition) doing so in the context of an adjudication decision for which no security had been provided and the company in insolvent liquidation had not sought to deal with the fundamental incompatibility arising out of the deprivation of cross-claim security discussed above. Because it was not necessary to do so, the issues raised in this section of the judgment were not framed as individual reasons which, of themselves, would be sufficient to justify non-enforcement of an adjudication. The question I must address is whether they are concerns which, if and to the extent satisfactory security is provided in relation to the sum awarded, remain sufficient justifications not to enforce an adjudicator's decision in circumstances where, as a matter of policy, (but for its insolvency) this Court ordinarily would do so in order to give effect to Meadowside's statutory and contractual rights and the general policy of enforcing adjudication decisions.

58. At paragraphs 48 and 49, Coulson LJ states:

> "*48. First, a liquidator has, by definition, limited assets available to him or her with which to pursue the claims of the insolvent company. It would ordinarily be a waste of those limited assets to make a claim which could not be enforced or, at best, could only be enforced in exceptional circumstances."*
>
> *49. I do not accept the idea that the adjudicator's decision might be of some use to the liquidator because it could somehow stand as a reduced proof amount (under Rule 14.11), or an estimate, or as some sort of assessment of the claim and cross-claim. The result of an adjudication is not the liquidator's best estimate of the value of a claim, but a sum found due by an adjudicator at a particular date, often based on the operation of the contractual payment provisions and the employer's failure to operate those provisions correctly. That may be far removed from the referring party's overall entitlement to recover, and the result would not be any kind of estimate or assessment of the parties' mutual debts.*"

59. This topic is discussed again at paragraph 59, in which Coulson LJ states:

> "*59. As to the assessment argument, Mr Arden QC made much of the fact that the result of the adjudication might prove useful to Bresco's liquidator, even without enforcement, because it would (or might) comprise an assessment of the net balance, I have rejected that submission in paragraph 49 above. In any event, this would require the responding party to participate in the adjudication and incur the costs of mounting its own cross-claim, just so that the liquidator can see what a net, non-binding result might look like. In circumstances where the liquidator*

> *would be unlikely to use litigation or arbitration for this exercise, because of the costs exposure, and/or in circumstances where the responding party would otherwise let its cross-claim lie because of the claiming party's insolvency, it would be an abuse of the cost-neutral adjudication regime to use it as a cheap assessment service, knowing that enforcement could never happen.*"

60. It is of course right that where a decision is a futile exercise, given the Court's reasoning under the preceding section '*Result*', it would ordinarily be a waste of resources to pursue the limited assets available to the liquidator upon such a course of action. However, that futility results from the lack of enforceability, and so, where the decision is capable of enforcement, the decision may not be a waste of assets. Moreover, in circumstances where the liquidator has appointed agents who bear the financial risk of recovering the net sum due (if any), it does not impact the liquidator's assets at all.

61. At paragraphs 49 and 59, Coulson LJ rejects the suggestion that the adjudication has some use as a 'reduced proof amount' (under Rule 14.11) or as some sort of assessment of the claim and cross-claim. It might be noted, however, that the reasoning identifies that this is so because the award is simply a sum found due by an adjudicator at a particular date, and that (referring back to the 'smash and grab' type adjudication), that may be far removed from the referring parties' overall entitlement to recover; and (in those circumstances) the result would not be any kind of estimate or assessment of the parties' mutual debts. That is obviously so in the context of an adjudication that sought recovery of sums based on contractual notice failures, or one which sought only to resolve one out of a host of issues between the parties. However, that reasoning does not apply to a situation, such as the present one, where it is accepted that the scope of the adjudication was to determine the net balance of all the parties' dealings.

62. At paragraph 59, using the adjudication as a cheap assessment service was described as an *'abuse of the cost-neutral adjudication regime'.* However, the context of that observation was expressly in circumstances where the liquidator did so, '*knowing that enforcement could never happen*'. It seems to me that the cost-neutral nature of adjudication cannot, of itself, be the problem, because this is the regime that statute has laid down. The point being made, it seems to me, is that adjudication is abusive in circumstances where it will not be enforced and is futile. It does not follow that using adjudication as a tool as part of overall debt recovery by an insolvent company is abusive if steps are put in place – such as security - so that the Court would enforce the decision.

63. Indeed, I do not read Coulson LJ as going so far as suggesting – outside the context where a decision is not enforceable – that using adjudication does not have any utility as an exercise in assessing the account between parties, and one which may, despite its temporary nature, often supplant more expensive and long running litigation as the way to resolve disputes permanently. As Coulson LJ remarks at paragraph 33:

> *"….the argument overlooks the fact that although the result of an adjudication is not usually final, it may be final, or it may become final. This could happen because both parties agree to treat the decision as final and binding, or because the decision is not challenged by either party*."

64. This plainly reflects the reality across the construction industry. Although it may have been a process which had its origins in a desire to maintain cashflow, the lifeblood of the construction industry (and alluded to in paragraph 37 of Bresco, quoted above), it would in my view be wrong to restrict the utility of adjudication, in light of the breadth of the statutory scheme and its practical use within the industry, as being solely about short term cashflow. The scheme is, for example, used to determine final account disputes, and professional negligence claims, neither of which are usually primarily (or at all) about cashflow. Adjudication is often about achieving a quicker and cheaper resolution to the parties' disputes. Where one party regards an adjudicator's decision as a real miscarriage of justice, it has the right to take the dispute to litigation or arbitration to have that decision effectively overturned; where, as is so often the case, the parties regard the decision as a decent attempt to arrive at a fair resolution of the competing positions, the parties generally treat the decision as binding or negotiate a settlement around it. This is good for the overall administration of justice and no doubt many cases which would otherwise end up in the TCC are resolved without burdening public resources as a result of the practical utility of adjudication, notwithstanding its temporary nature.

65. Generally, whilst the question of utility to the liquidator is, following Bresco, a necessary factor in the overall exercise of discretion to consider, I am also persuaded that the Court should as a matter of public policy be slow to hinder the liquidator's efforts to ascertain and recover debts in accordance with its statutory obligations. I take comfort, in this regard, from the judgment of Mr Justice Marcus Smith in *Absolute Living Developments Ltd (In liquidation) v DS7 Ltd* [2018] EWHC 1432 (Ch), a case concerning security for costs against a party in liquidation. As part of the discussion, Smith J concluded that the provision of security for costs by a liquidator would in effect create a regime where, in advance of an adverse costs order, the liquidator was being obligated to provide security:

> '*That, as it seems to me, is entirely contrary to the public interest in the insolvency regime that exists in this jurisdiction. It is critical in the public interest that liquidators proceed in a manner that is uninhibited in terms of deciding how to bring actions, including how those actions are framed and funded*'.

66. Plainly, Smith J is referring to court litigation, rather than adjudication. It is plain that given the inherent incompatibility of adjudication where a cross-claim exists, and where no security exists preserving the Respondent's rights under Rule 14.25, liquidators will, by the decision in Bresco, be inhibited in deciding how to pursue payment they consider due. This essential hindrance is necessary to preserve the right of a party with mutual dealings with the company in insolvency to security for its cross-claim. However, where those concerns are addressed, the Court should generally not seek to inhibit the manner in which the liquidator seeks to use all contractual or statutory mechanisms available to the company in liquidation to realise its debts.

67. Mr Graham-Dixon argued that, in circumstances where all or part of the 'security' was the offer by the Liquidator to ringfence the money pending determination of finality, the adjudication was by definition deprived wholly or substantially of any 'utility'. This was so, it was contended, because adjudication is all about cashflow and where the sum is ringfenced the purpose of the adjudication can no longer, by definition, be about cashflow. For the reasons set out above, I do not see that the utility of adjudication

should be defined so narrowly and do not therefore accept the argument. It is right that many adjudication claims – which are effectively all about cashflow and contractual interim payment obligations - are not the sort, following Bresco, that would bring themselves into an exception from the principle that companies in liquidation cannot enforce adjudication awards. This would likely be the case irrespective of the question of security, because of a broader lack of utility. However, where the adjudicator is in effect deciding the net mutual position between the parties, or at the very least a substantial part of it, the utility to the liquidator of pursing the debt in the first instance in adjudication should not of itself be regarded as a reason to refuse summary judgment or grant a stay of execution.

68. The next consideration is dealt with by Coulson LJ at paragraph 50:

> *"Secondly, there are the costs incurred by the responding party. Why should a responding party have to incur the costs of defending an adjudication brought by a company in insolvent liquidation, when it knows that, even if it was unsuccessful in the adjudication, it would be able to resist summary judgment or enforcement as of right, although it would have to spend further sums to achieve that result? This would mean that the responding party was obliged to fund its (reluctant) role in a futile process. That must be wrong in principle."*

69. The observations of Coulson LJ are predicated on the futility of the process, which itself relates back to the unenforceability of the decision in circumstances, in *Bresco*, where no security was provided so that the inevitable result of enforcement was the loss by the responding party of its security for the cross-claim to which it is entitled under the Insolvency Rules. If there are circumstances in which a company in liquidation is entitled to enforcement, because it is able to provide adequate security pending any final determination, the objection falls away.

70. The next objection in *Bresco* is at paragraph 51:

> *'Thirdly, even if we assume that the company in insolvent liquidation is successful in the adjudication and that, for whatever reason, summary judgment is granted, the responding party would then have to bring its own claim in court to overturn the result of the adjudication. That would require yet more costs to be incurred by the responding party to regularise its position and recover the sums due from a company in insolvent liquidation. The obvious risks would be that any recovery may be rendered difficult or impossible by the liquidation, and that further costs would be lost in any event. Security for costs would not be available (because on this basis the responding party would be the claimant). Again, that seems to me to be wrong as a matter of principle.'*

71. Breaking this down, the concern (on the assumption that a decision requiring payment to the company in liquidation has been enforced) expressed by Coulson LJ is that:

(1) Any recovery of the sum paid would be rendered difficult or impossible by the liquidation;
(2) Further costs would be incurred seeking to recover the sum;
(3) Security for costs would not be available, as the responding party would be the claimant.

72. Each of these obviously applies in the ordinary situation of a company in liquidation where no particular offers of security are provided.

73. However, the first concern (difficulty or impossibility of the recovery of the sum) is no longer a concern if there is adequate security for and/or ring fencing of the sum awarded.

74. The second and third concerns relate to costs. In this case, Pythagoras has offered security for costs by way of guarantee, and/or by way of ATE insurance. There is, of course, the question of the adequacy of that guarantee and/or insurance in the particular circumstances of this case, which I consider further in Section E below.

75. However, as a matter of principle, if security for the costs of overturning the Adjudicator's Decision is in place, this objection is also (largely) dealt with. Indeed, on one view, the responding would be in a better position than ordinarily would be the case where the referring party is not in liquidation but otherwise has fairly limited means. Under the principles in Wimbledon v Vago, it would not be open to a defendant against whom there was a valid adjudication award to argue that judgment should be stayed because, although the company was likely to be in a position to repay the sum awarded, they would probably not also be able to pay any adverse costs order in the following litigation. They too would not be able to obtain security for costs, as claimant in any later litigation. The fact that a responding party may be placed in such a situation is merely part and parcel of the operation of the statutory right to adjudicate, and is not of itself regarded as unjust (or so unjust to allow a stay of execution). This may be so, even in circumstances where the award results from a 'smash and grab' adjudication in which the substantive merits of the account between the parties was not considered.

76. On the other hand, I accept one disadvantage the responding party may still find itself, as argued by Mr Graham-Dixon, is that it will incur a proportion of irrecoverable costs in any later litigation and the best it can do from pursuing its cross-claim – by reason of the insolvency of the referring party – is a recovery of the sums paid out upon enforcement. To the extent the responding party demonstrates an entitlement on its cross-claim in excess of the amount awarded in adjudication and enforced, it will have a claim in the liquidation, and this in reality may be worth nothing. Whilst I accept that this is a disadvantage, it is a disadvantage of a very different order to that with which Coulson LJ was expressly dealing in paragraph 51, focussed as he was on all the lost costs (both recoverable and irrecoverable) of having even to recover the adjudication award. The question is, whether in the round, the remaining disadvantage is of sufficient weight to justify depriving a company of its statutory right to adjudicate, when the other concerns raised by the Court of Appeal in Bresco have been effectively addressed. I consider this in Section D below.

77. The final concern raised by the Court in Bresco is set out at paragraph 52:

> "*Finally, there is the question of the court's resources. If Mr Arden QC was right, so that companies in insolvent liquidation could commence and run adjudication proceedings all the way through to enforcement proceedings, to see how things might turn out at that stage, there would be an increase in the number of enforcement applications, and a further strain on the already overburdened resources of the TCC. It would have an adverse*

effect on other court users, including those companies who have organised their affairs in such a way that they are not in insolvent liquidation."

78. Again, it seems to me, that this comment was principally predicated in the context of the preceding concerns about the general futility of adjudication in the circumstance of Bresco.

79. As Coulson LJ points out at paragraph 39, the vast majority of adjudications would not be of the sort suitable in any way for enforcement in the context of a company in liquidation, irrespective of the question of security. This is echoed by the observations by Sir Antony Edwards-Stuart in *Indigo* that the final account type of adjudication is '*fairly rare*'. In respect of only a subset of these, most probably fairly small, would a referring party be a company in liquidation. Of those in liquidation, a proper scrutiny of the merits of the claim by the party providing funding for the adjudication and the requisite security to allow enforcement, if Meadowside's arguments are acceded to, will mean that it is in relation to a smaller number still that it is considered by them economically viable to seek a successful recovery on behalf of the liquidator. And finally, where the Court gives general guidance as to the type of situations in which adjudications will or will not be enforced as an 'exception', parties will generally be able to determine for themselves the likely outcome of an application to Court and save themselves the costs, and costs risk, of arguing a point.

80. As such, I do not regard the comment of Coulson LJ in paragraph 52 concerning the question of the Court's resources of itself to mean that there will not be exceptions to the general principle that a company in liquidation cannot pursue an adjudication to enforcement. Indeed, in paragraph 53, his comments are limited to the 'ordinary' case, where no specific steps have been taken to meet the specific problems and unfairness to the responding party caused by the use of adjudication in the context of a party in liquidation.

D. Bresco: is there an exception to the rule?

81. The fundamental incompatibility of the adjudication process on one hand and the insolvency regime on the other means that in the ordinary case, a company in liquidation cannot pursue an adjudication and successfully enforce the decision. As a result, the Court will injunct a party seeking to do so, and/or refuse to enforce the decision or grant a stay of execution.

82. In order to determine those circumstances, contemplated in theory at least by the Court of Appeal in Bresco, in which it was accepted that there may be exceptions to the ordinary position, it has been necessary to explore the rationale for both the incompatibility and the determination that, in light of that incompatibility, the insolvency process prevails.

83. Having done so, in my judgment, there will be circumstances in which the correct balance between the rights of parties under the Insolvency Rules and the contractual and/or statutory rights of parties to adjudicate under the Housing Grants, Construction and Regeneration Act 1996 at any time is to permit enforcement. This exception arises where the legitimate concerns of the Court relating to the utility of an adjudication, the preservation of the responding party's right to security for its cross-claim and the

reduction or elimination of costs risk upon the responding successfully overturning the adjudicator's decision are all met by relevant safeguards.

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.

85. However, against this I bear in mind that a liquidator has a statutory obligation to collect the companies' debts. Ordinarily, a party to a construction contract has the right to adjudicate and retain sums, following a successful adjudication, pending any action by the other side to recover the sums. For the reasons set out above, this has some real practical utility that goes beyond cashflow. It might also be thought that (if the third party funding business model is successful) in the small number of cases identified for pursuit in this manner in which the funder is putting up security and accepting liability for an adverse costs order in any subsequent litigation, there is a reasonable chance that the company in liquidation's entitlement to payment is in, fact, a good one which, despite its merits, would otherwise be impossible or difficult for the liquidator to realise. It is commercially unrealistic to suggest that if the liquidator or its funder has faith in the claim, they should simply fund the case to litigation or arbitration rather than adjudication. Irrespective of liquidation, parties use their contractual and statutory rights to adjudicate as a means of enforcing their contractual rights when they would not contemplate the risk and expense of litigation. Providing adequate safeguard to balance the interests of the parties are put in place because of insolvency, there would seem to be little justification in removing the tool of adjudication, which has generally proved very effective in allowing parties to resolve their disputes without the need to burden the Courts, from liquidators. It may also be that the existence of funding itself is dependent upon the ability to adjudicate: for example, the provision of ATE insurance is likely to be easier and cheaper following a successful adjudication (where a provisional view on the merits has already been given by a third party), than where no such assessment has been undertaken.

86. There is an obvious injustice if the company in liquidation is, in reality, the net debtor between the parties and enforces an adjudication award to the contrary with the practical effect of finality, and the loss of the responding party's security against its cross-claim. Yet, there is also injustice if the responding party is, in reality, the net debtor and by reason of the absence of funds available to a liquidator to pursue debtors, is able to evade its contractual liabilities to assess the sum due and pay it. It receives an undeserved windfall. In the modern world, it is common place for liquidators to approach third party funders. This is considered further below in relation to the question of champerty. Setting that question aside for present purposes, the general position is that the Courts ought, for public policy reasons, to support liquidators and

their agents in collecting sums due to companies in liquidation. As Mr Justice Smith remarked, in Absolute Living, it is in the public interest that liquidators proceed in a manner that is generally uninhibited in deciding how to frame and fund actions to collect sums thought to be due and owing. It is clear that Bresco places important limits on the use of adjudication in the ordinary case to safeguard the rights of the debtor(/creditor); but where the central rationale for incompatibility is dealt with satisfactorily by the provision of security for the awarded sum and costs, the balance in my view should shift to one which permits a party to utilise the statutory and contractual entitlements at its disposal to pursue its right to payment. The fact that the onus then shifts to the responding party to bring its proceedings within a reasonable period of time if it wishes to overturn the adjudicator's decision is of itself unremarkable and a consequence of the intention to strike a balance between the rights of the two parties.

87. For these reasons, in my judgment, a case is likely to be an exception to the ordinary position in circumstances where:

(1) The adjudication brought or to be brought determines the final net position between the parties under the relevant Contract. An adjudication, by definition, will not be able to determine the net position between parties with dealings on more than one contract. The extent to which the adjudication is not capable of dealing with the entirety of the mutual dealings between the parties (and as such will not mirror the Rule 14.25 process between the parties) is to be taken account of in all the circumstances when looking at the utility of the adjudication and the discretion either to injunct, or, following adjudication, to enforce;

(2) Satisfactory security is provided both:

(a) In respect of 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 favour of the responding party in respect of:

(i) Any unsuccessful application to enforce the adjudication decision;

(ii) The subsequent litigation/arbitration, in which the responding party is seeking to overturn the adjudication decision;

The extent to which any such costs order is ordered to be met from the security would be a matter for the Court, insofar as it was not agreed.

(3) What is satisfactory as security in form, duration and amount is a question on the facts in the ordinary way and may be provided incrementally (as it would be, for example, in any security for costs application). 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 a bond;
(c) ATE insurance.

This is discussed further in Section F below, in the context of the offers made by Pythagoras.

(4) As discussed further below in Section E, any agreement to provide funding or security which permits the company in liquidation to avoid the ordinary consequences of Bresco cannot amount to an abuse of process.

E: Champerty

88. Mr Graham-Dixon advances the argument that:

(a) Funding agreements which do not leave the claimant as the party primarily interested in the result of the litigation will typically be champertous;
(b) The funding agreement is of a type regulated by the Damages Based Agreements Regulations (2013) ('DBAR 2013'), which permits a maximum recovery by the funder of 50% of sums awarded;
(c) In light of the refusal on the part of Pythagoras to disclose the nature of the funding agreement (and in particular what percentage of any proceeds it will be paid), it is not known whether the agreement is or is not champertous and/or outside the permitted agreements under the DBAR 2013;
(d) If the only basis upon which Meadowside/Pythagoras are offering security or bringing this claim is on the basis of or pursuant to an agreement which is champertous and/or not permitted under the DBAR 2013 (in either case, a funding agreement that should be regarded as 'illegitimate'), the Court should not allow them to be treated in an exceptional manner to avoid the position in *Bresco.* The legitimacy of the agreement therefore '*bears on*' the enforceability of the decision;
(e) If potential illegitimacy of the funding agreement would be a ground for refusing summary judgment and/or allowing a stay, there is a real factual question in respect of whether the agreement is illegitimate, and that is a reason to refuse summary judgment.

89. Ms White argues:

(a) The funding agreement is not caught by the DBAR 2013, and is not champertous;
(b) Pythagoras is acting as agent for the liquidator and maintenance and champerty does not arise as a matter of principle;
(c) In any event, even if it was, this would not be a reason not to enforce by summary judgment the adjudication decision.

90. The interrelationship between champerty and the DBAR 2013, the application of the DBAR 2013 to the funding agreement, the consequence of any potential non-compliance with the DBAR 2013 and/or champerty on the right to summary judgment (if it otherwise existed) were all matters upon which the Court requested, and received, further substantial written submissions following the oral hearing, for which I am extremely grateful.

Does the DBAR 2013 apply to the funding arrangement in principle?

91. The starting point is Section 58AA of the Courts and Legal Services Act 1990 ("CLSA 1990"). This states that:

> *58AA Damages-based agreements*
>
> *(1) A damages-based agreement which satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.*
>
> *(2) But (subject to subsection (9)) a damages-based agreement which does not satisfy those conditions is unenforceable.*
>
> *(3) For the purposes of this section—*
> *(a) 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 obtains 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*
>
> *…*
> *(7) In this section—*
> *"claims management services" has the same meaning as in the Financial Services and Markets Act 2000 (see section 419A of that Act)*
>
> *(7A) In this section (and in the definitions of "advocacy services" and "litigation services" as they apply for the purposes of this section) "proceedings" includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.'*

92. There is no dispute between the parties that if Pythagoras is to be regarded as a company '*providing advocacy services, litigation services or claims management services*' for the purposes of the Act then the remainder of section 58AA(3)(a) applies, and that, in turn the DBAR 2013 applies. It is plain from Pythagoras' own description of the arrangement with the Liquidator that the Liquidator is to make a payment to Pythagoras if the Liquidator obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.

93. It should be noted that section 7A extends '*proceedings'* to any sort of proceedings for resolving disputes (and not just proceedings in Court). I accept Mr Graham-Dixon's submission that this would therefore include adjudication proceedings.

94. The principal dispute between the parties focussed on whether Pythagoras could be regarded as providing '*claims management services*'. The CLSA 1990 was amended most recently, from 1 April 2019, by the Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018/1253, which had the following relevant effect:

(1) The version of s. 58AA(7) in force prior to 1 April 2019 stated that "claims management services" has the same meaning as in Part 2 of the Compensation Act 2006 (see section 4(2) of that Act)."

(2) The current version of s. 58AA(7) states that ""claims management services" has the same meaning as in [the Financial Services and Markets Act 2000 (see section 419A of that Act)]."

95. The Compensation Act 2006 provided in s. 4(2)(b)-(c) (now repealed):

> *"(b) "claims management services" means advice or other services in relation to the making of a claim,*
>
> *(c) "claim" means a claim for compensation, restitution, repayment or any other remedy or relief in respect of loss or damage or in respect of an obligation, whether the claim is made or could be made–*
>
> *(i) by way of legal proceedings,*
>
> *(ii) in accordance with a scheme of regulation (whether voluntary or compulsory), or*
>
> *(iii) in pursuance of a voluntary undertaking…*"

96. The approach under s. 419A of the Financial Services and Markets Act 2000 ('FSMA 2000') is effectively the same, save that the words "other services" are now given their own further definition:

> *"(1) In this Act "claims management services" means advice or other services in relation to the making of a claim.*
>
> *(2) In subsection (1) "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.*
>
> *(3) In this section "claim" means a claim for compensation, restitution, repayment or any*
> *other remedy or relief 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.

97. Mr Graham-Dixon argued that under either definition, Pythagoras falls to be considered as providing advice and/or other services in relation to the making of insolvent contractors' claims in both adjudication and enforcement proceedings, and this amounts therefore to '*claims management services*'. Indeed, it is said that Pythagoras may provide each of the '*other services*' within the definition (which is not an exhaustive list). I agree. It could not be sensibly disputed that Pythagoras is providing (for example) financial assistance in relation to the Liquidator's claim. This is at the very heart of Pythagoras' services and it is that which enables the claims to be ascertained and pursued. In reality, it is also providing advice and other services to ascertain and, if appropriate, recover the debt.

98. I therefore accept that the description of Pythagoras' work on behalf of the Liquidator, as described by Mr McMahon and quoted in paragraph 10 above, would include 'advice or other services' as described in either Act.

99. This would appear to be accepted by Ms White whose argument does not depend on demonstrating that these are not the type of services provided by Pythagoras. Instead, it is argued that what constitutes 'claims management services' is not defined by the four corners of section 419A of the FSMA 2000 (or its equivalent under the Compensation Act 2006). Ms White argues that what constitutes 'claims management services' is constrained by the purpose of the FSMA 2000, which is to allow Parliament to restrict and regulate certain types of 'claims management services'. The types of 'claims management activities' regulated are personal injury claims, financial services or financial product claims, housing disrepair claims, claims for a specified benefit, criminal injury claims and employment related claims. It is therefore argued that the services provided by Pythagoras do not fall within the definition of regulated 'claims management activities' from which the definition of 'claims management services' is derived. As such, it is said, Pythagoras' appointment is not caught by the DBAR 2013.

100. It is certainly correct that activities that are or relate to claims management activities can be regulated under the framework of the FSMA 2000. However, I accept the argument of Mr Graham-Dixon that it does not follow that the specification of regulated activities operates to define 'claims management services' under s. 419A of the FSMA 2000. Section 58AA(7) of the CLSA 1990 simply pulls the definition of 'claims management services' and imports that definition to give meaning to the use of the phrase in Section 58AA3(a), as though the same had been set out in full in a definitions section in the statute. Had the interpretation advanced by Ms White been intended, s. 58AA would have referred to <u>regulated</u> claims management services and cross-referred to other relevant sections which would have made clear the contended intention that claims management services under the DBAR 2013 were specifically limited to particular types of claim. It does not do so. The position under the Compensation Act 2006 is the same.

101. This is clear as a matter of statutory interpretation. However, I take further comfort from the Explanatory Note to the DBAR 2013 (which, although not part of the Regulations, can be used to aid construction if the Regulation was ambiguous, as it

would be if Ms White's argument were correct). This states, '*Prior to amendment by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c.10), section 58AA off the Act only provided for the regulation of DBAs used in employment matters. The effect of the amendment, subject to exceptions, is to permit and regulate the use of DBAs in all civil litigation.'* The reference to 'all civil litigation' is obviously consistent with the construction advanced by Mr Graham-Dixon, and inconsistent with the limited scope advanced by Ms White.

102. I therefore reject the argument advanced by Ms White, and decide that the funding arrangement between Pythagoras and the Liquidator is one to which the DBAR 2013 applies.

103. Although not necessary in light of my finding above, it seems to me likely that Mr Graham-Dixon is also correct that the making of submissions and the preparation of necessary documents within the adjudication would be regarded as 'advocacy services' and/or 'litigation services'. Given that the section would apply to adjudication proceedings, this is a further reason that the agreement pursuant to which Pythagoras provides these services to the Liquidator is one regulated by the DBAR 2013.

If the DBAR 2013 applies, what is the effect on the appointment and these proceedings?

104. Pursuant to Regulation 4 of the DBAR 2013:

> ...
> *'(3) Subject to paragraph (4) in any other claim or proceedings to which this regulation applies, a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 50% of the sums ultimately recovered by the client.'*

105. Although Pythagoras has not disclosed the percentage recovery it has agreed with the Liquidator, the obvious inference from the arguments advanced by Ms White is that the percentage is greater than the 50% permitted. The effect of this, pursuant to the DBAR 2013, is that the agreement is unenforceable. Ms White implicitly accepts this at paragraph 20 of her further skeleton where she submitted: '*Even if the court finds that Pythagoras's appointment is caught by the DBA Regulations 2013, such that it is unenforceable…'.*

106. Mr Graham-Dixon also asserts that, although Sections 58AA(1)-(2) may be unhappily worded, the effect is that a DBA which does not satisfy the conditions of the DBAR 2013 is unenforceable. I agree.

107. On the face of it, this is primarily an issue between Pythagoras and the Liquidator. The central question for me is whether there is a wider consequence in the context of this application for summary judgment. Does the fact that a funding agreement which sits behind the company in liquidation on an application such as this is itself non-compliant with the DBAR 2013 and is unenforceable bear upon the application? Ms White is undoubtedly correct to submit that the mere fact that Pythagoras' appointment may fall away as between it and the Liquidator would not vitiate any Guarantee provided by

Pythagoras (or another), or any insurance policy that might be put in place to offer costs protection; nor, I would add, would it affect any undertaking by the Liquidator that the sums would be ringfenced pending final resolution of the claim.

108. The only way in which a determination that the agreement does not comply with the DBAR 2013 may be relevant, in my judgment, is the extent to which (a) that assists the Court in determining whether a particular arrangement is to be determined as champertous; and (b) in turn, whether the effect of the champerty is, in the particular circumstances of the case, an abuse of process which would justify a stay.

In light of the finding as to non-compliance with the DBAR 2013, or in any event, is the funding agreement champertous?

109. As set out in the judgment of Lord Phillips in Factortame Ltd v Secretary of State for Transport, Local Government and the Regions (No 8) [2002] EWCA 932, champerty is a variety of maintenance. Champerty and maintenance used to be both crimes and torts, until the enactment of the Criminal Law Act 1967. While criminal and civil liability was abolished, the rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal remained. A champertous agreement will as a rule of public policy render a contract unenforceable. At paragraph 32, His Lordship identified the clear link between the common law position and public policy, and that the latter changes. Thus, he quoted Danckwerts LJ in Hill v Archbold [1968] 1 QB 686, '*the law of maintenance depends upon the question of public policy, and public policy…. is not a fixed and immutable matter. It is a conception which, if it has any sense at all, much be later able by the passage of time.'*

110. At paragraph 36, Lord Phillips said:

> "*Where the law expressly restricts the circumstances in which agreements in support of litigation are lawful, this provides a powerful indication of the limits of public policy in analogous situations. Where this is not the case, then we believe one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice*"

111. This point was repeated at paragraph 61, when considering section 58 of the CLSA 1990: '*The effect of the section extends more widely, however, for it reflects Parliament's assessment of the present state of public policy in this area.*' The paragraph went on to note that in Awwad v Geraghty & Co [2001] QB 570, the Court of Appeal held that there was no scope for the court to hold that the common law permitted conditional fee agreements that did not conform to the requirements imposed by section 58. Indeed, in that case May LJ stated, in the context of conditional fee agreements:

> "*The difficulties and delays surrounding the introduction of conditional fee agreements permitted by statute emphasise the divergence of view. In my judgment, where Parliament has, by*

> *what are now (with section 27 of the Access to Justice Act 1999) successive enactments, modified the law by which any arrangement to receive a contingency fee was impermissible, there is no present room for the court, by an application of what is perceived to be public policy, to go beyond that which Parliament has provided. That applied with, if anything, greater force in 1993 than it does today*."

112. Mr Graham-Dixon contends that there is a 'high risk' of champerty where a funder with no pre-existing interest in a claim obtains control of proceedings and will recover more than 50%. This is because, through statutory regulation, parliament has seen fit to regularise the types of agreement which might otherwise have been regarded at common law as champertous, but in doing so, have expressly limited the proportion of recovery to which the service provider is entitled to 50%.

113. This conclusion is a justifiable one and in accordance with the approach of the Court of Appeal in *Factortame* as set out in paragraph 36 and 58 quoted above. Indeed, on the basis of *Awwad* it would seem that it is not open to this Court to conclude that an agreement caught by the DBAR 2013 and which is non-compliant with those Regulations is nevertheless enforceable, in circumstances where parliament has legislated that it is unenforceable. It is not for the court to supplant parliament's view of what public policy dictates in this arena with any view of its own. The only logical conclusion to be derived from its unenforceablity 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. In light of this, it is not necessary for me to consider further a number of the authorities relating to cases in which funding agreements, (which predated the DBAR 2013) relied upon by Mr Graham-Dixon insofar as their purely relate to the question of champerty, rather than abuse of process.

114. The basis upon which Ms White contends that the agreement is not champertous is that Pythagoras is appointed as 'agent' for the Liquidator. It is said, *a fortiori*, that the agreement cannot be champertous. I do not agree. It is not mutually exclusive to describe a contractual relationship as one of 'agency' whilst, nevertheless, being an agreement which, because of the funding arrangements, is one caught by the DBAR 2013. In any event, it is necessary to look to the substance of what Pythagoras does rather than the label of 'agency'. I have found that the agreement for the services of financing, ascertaining and recovering a debt through adjudication and litigation (whether as 'agent' or otherwise) is one to which the DBAR 2013 applies. It also follows from the reasoning above that, irrespective of the label 'agent', the non-compliant agreement would be unenforceable pursuant to the Regulations and, as a result, champertous in the eyes of the common law.

115. Similarly, I do not regard it as relevant to this analysis (contrary to the submissions of Ms White) that the appointment of Pythagoras as agent was within the powers of the Liquidator under paragraph 12 of Schedule 4 of the Insolvency Act 1986, that the decision was a commercial or administrative one made in the best interest of creditors and that, unless it was a decision that was taken in bad faith or was *Wednesbury* unreasonable (which it is not suggested is the case) the Court should not interfere. None of these matters affect the analysis as to (a) the nature of the agreement entered into; (b) whether the DBAR 2013 applies and, if so, whether the agreement is

enforceable; and (c) in these circumstances, the common law's view as to whether such an agreement is champertous.

If it is champertous, is there an abuse of process so as to justify a stay?

116. The fact that the funding agreement is champertous means the agreement is unenforceable.

117. However, as Ms White contends, and Mr Graham-Dixon acknowledges, this of itself is neither a defence to a cause of action, nor does it not amount to an abuse of process. In a passage which both Counsel drew to my attention from Stocznia Gdanska SA v Latreefers Inc [2001] BCC 174, Morritt LJ stated at paragraphs 59:

> "*A person who has funded an action champertously may fail to enforce recovery of the agreed proportion of the spoils. A person who has secured a champertous agreement to fund his litigation may be unable to enforce payment of the agreed funds. But the fact that a funding agreement may be against public policy and therefore unenforceable as between the parties to it is by itself no reason for regarding the proceedings to which it relates or their conduct as an abuse*."

118. Mr Graham-Dixon nevertheless relies upon the decision of Lightman J in Grovewood Holdings Pic v James Capel & Co Ltd [1995] Ch 80 that there was a 'general rule' proceedings that are maintained champertously should be stayed as an abuse of process. He fairly points out that Lloyd J (at first instance) and Morritt LJ and May LJ in Stozcnia doubted the reasoning. However, this understates the position: it is difficult to see how the particular suggestion that the general rule is that proceedings that are maintained champertously should be stayed as an abuse can survive the clear indication from the Court of Appeal at paragraph 59 that no such presumption exists (I note that many other parts of the judgment have been followed or received positive judicial treatment). I also derive little assistance in the issues I have to determine from Ruttle Plant Limited v Secretary of State for the Environment, Food and Rural Affairs (No 2) [2009] 1 All ER, which related to the assignment of rights and the abrogation by the liquidator of his responsibilities, of which there is no proper evidence or inference here. Moreover, the case concerned the enforceability of the agreement (and hence the question of champerty), and not the staying of proceedings for abuse of process. Similarly, Re Oasis Merchandising Services Ltd (in liquidation) [1998] Ch 170 concerned the removal of approval by the registrar of a liquidator's wrongful trading action against a party under section 214 of the Insolvency Act 1986 in circumstances where the liquidator made an agreement with a financial backer to share the proceeds of the action. As made plain in the judgment, a wrongful trading action was not an ordinary civil action, but civil litigation with a public or penal element. Such a cause of action vests in the liquidator personally. This gives little guidance to the present set of facts.

119. Before arriving at the conclusion quoted above, Morritt LJ had quoted extensively from the judgments of Chadwick and Simon Brown LLJ in Faryab v. Smyth (unreported, 28 August 1998). Of particular guidance are the following passages (from Morritt LJ in Stocznia quoting Faryab):

"Chadwick LJ then said :

It was accepted by this Court in Abraham v. Thompson that, although the court retains the power to stay proceedings if satisfied that they constitute an abuse of process, the mere fact that the proceedings are being financed by a third party with no interest in the outcome - other than in relation to the prospects of repayment - is not of itself sufficient abuse to invoke the jurisdiction of the court. The court is entitled to protect its own procedures; see Roache v. News Group Newspapers The Times, November 23, 1992; but it should be careful not to use that power so as to deny access to justice to a party who has sought to fund his proceedings in a way which may itself become contrary to public policy, unless that which has been done can be seen to amount to an abuse of the court's own process.

Chadwick L.J. considered what element of public policy was affronted by the funding arrangement in the case before the court. He referred to the well known passage from the speech of Lord Mustill in Giles v. Thompson [1994] 1 AC 142 at 161B. He said that the description of maintenance referred to in that passage was indistinguishable from that given by Jenkins L.J. in Martell v. Consett Iron. Chadwick L.J. then said:

"That conduct, of itself, has not been regarded as an abuse of process. Does the offensive conduct become an abuse because there is some notion of a division of the spoils? In my view the court is required to consider in the light of the facts in each case whether its process is affected or threatened by the agreement for the division of spoils."

57. Chadwick L.J. considered that there was no abuse of the process of the Court of Appeal if the appellant's ability to comply with an order for security for costs resulted from a funding agreement provided on terms that the funders would obtain a substantial premium on repayment of the loan. He considered that the court did not have any other interest in protecting its process from abuse which required it to prevent the appeal from continuing. He said that, although there might well be cases where the court could see that there is some feature - "some element of trafficking in litigation" - which must be regarded as abusive, that feature was not present in the case before the court. He also considered that the court should discourage satellite litigation of the kind before the court in that application.

58. Simon Brown L.J. agreed that the application for a stay should be dismissed. He said:

"What distinguishes lending from maintenance on the one hand and, in turn, maintenance from champerty on the other, seems to me at the border lines to raise very difficult questions. Similarly,

the point at which any particular funding agreement, even assuming it is technically champertous, could be said to constitute an abuse of process is itself very far from clear. Many factors are likely to be in play. Amongst them will be these: (1) the terms of the funding agreement between the litigant and his funder; (2) their relationship quite apart from that agreement; (3) whether or not (and if so how and in what circumstances) the litigant proposes to repay the funder; (4) the relationship between the fund provided, the sum (if any) to be repaid and the sum at issue in the action; (5) the precise purpose within the proceedings for which the fund was provided."

120. Morritt LJ then continued at paragraphs 60 and 61*:*

> *"60. As Chadwick L.J. said in Faryab v. Smyth, the question whether the courts' process is affected or threatened by an agreement for the division of spoils is one to be considered in the light of the facts in each case. We reject Mr Glennie's submission that the court should formulate a more circumscribed test limited to a consideration of the structure and apparent purpose of the funding agreement and the kind of litigation to which it is directed. The considerations to which Simon Brown L.J. referred in Faryab v. Smyth may in a particular case be relevant and important but they are not exclusive nor necessarily determinative in the abstract. Unless the funding agreement is plainly and obviously champertous, it will usually not be necessary to decide that question for the reasons given by Chadwick L.J. and by Millett L.J. in* Abraham v. Thompson.
>
> *61. Abuse of the court's process can take many forms and may include a combination of two or more strands of abuse which might not individually result in a stay. Trafficking in litigation is, by the very use of the word "trafficking", something which is objectionable and may amount to or contribute to an abuse of the process. We think that it is undesirable to try to define in different words what would constitute trafficking in litigation. It seems to us to connote unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation. "Wanton and officious intermeddling with the disputes of others in which they [the funders] have no interest and where that assistance is without justification or excuse" may be a form of trafficking in litigation. Lord Mustill's words, quoted by Simon Brown L.J. in the context of an application to stay, are powerfully descriptive of the kind of plain and obvious champerty of which Chadwick LJ considered Faryab v. Smyth itself not to be an example. A large mathematical disproportion between any pre-existing financial interest and the potential profit of funders may in particular cases contribute to a finding of abuse but is not bound to do so.'*

121. As made clear in the discussion within *Stocznia* quoted above, the determination of the question of abuse of process is one of fact in any given case. 'Trafficking' in litigation is something which may amount to or contribute to an abuse of process. It is clear that something that is champertous may amount to 'trafficking' in litigation. However, simply because parties have, on the face of it, agreed a percentage recovery that makes the agreement unenforceable between the two does not, of itself, mean that there exists the '*wanton and officious intermeddling with the disputes of others in which they [the funders] have no interest and where that assistance is without justification or excuse'.*

122. The sort of features a Court would wish to take into account are set out in the judgment of Simon Brown LJ, in Faryab, quoted in Stocznia above. By reference to this guidance, Ms White submitted that all relevant facts are known. It is right that, in the majority of cases, little more will be needed than some background, and the details of the arrangement itself, in order to determine the question of abuse of process summarily. Indeed, where the issue is one of a stay rather than enforceability of an agreement, the Court may be able (as it did in Stocznia) simply to deal with the question of abuse of process without firmly deciding the question of champerty one way or another.

123. Attempting to form a view on the questions demonstrates that, contrary to Ms White's submission, all the relevant details are not known. So:

(1) ***The terms of the funding agreement between the litigation and his funder***. This is probably the most essential piece of information, and has not been provided (despite numerous requests). Ms White submits that this is answered simply by the (known) fact that '*Pythagoras will be paid by a percentage of the fruits of litigation as and when realised*'. This is obviously only a partial answer. Absent knowledge of the percentage, it is impossible to form any sensible view on the true balance of interests between the funder and the funded. Moreover, the fact that the Court has been provided only with the letter appointing Pythagoras as agent which does not include the basis of remuneration, it is plain that some other agreement, written or verbal, exists of which the Court has been provided no evidence.

(2) ***Their relationship quite apart from that agreement***. The Court can accept that, apart from the agreement, there is no connection between Pythagoras and the Liquidator. However, the absence of a pre-existing relationship (as opposed to an interest in the underlying project, as was the case in Stocznia), whilst of itself not in any way determinative, may be an indicator for rather than against abuse of process;

(3) ***Whether or not (and if so how and in what circumstances) the litigant proposes to repay the funder.*** It is known (in general terms) that this is out of the fruits of the litigation as and when realised. However, it may be that the specific arrangement for the timing of repayment affects the nature of the interest in any subsequent litigation. For example, if sums recovered are to be provided to the Liquidator, net of Pythagoras' fee, immediately upon being '*realised'* following a successful enforcement (without ringfencing) then those funds would be available for distribution. The only real interest in fighting the subsequent litigation would then be to ensure the guarantee was not called upon,

and this interest would be *entirely* Pythagoras' (even if Pythagoras was ostensibly still the Liquidator's agent). On the other hand, the agreement might be that no payment from the fruits of the litigation takes place until after any 'final' determination (i.e. following subsequent litigation, or settlement, or the lapse of the guarantee). In these circumstances, both Liquidator and Pythagoras would retain interest (in their respective shares) throughout. This difference may be relevant to a distinction between mere champerty and an abuse of process.

(4) ***The relationship between the fund provided, the sum (if any) to be repaid and the sum at issue in the action*.** Without knowledge of the percentage recovery, the sum to be repaid (on any given assumption of success) and its relationship to the other sums is incapable of determination.

(5) ***The precise purpose within the proceedings for which the fund was provided*.** This is (probably) known: it is for funding the advancement of the claim in adjudication, enforcement, and subsequent litigation and the provision of any necessary security to make that possible.

124. Mr Graham-Dixon argues that the issues relating to champerty may bear on the enforceability of the Decision. This is correct. I agree with Mr Graham-Dixon's submission that a Court would not permit a party to bring itself within an exception to the ordinary position of a company in liquidation as described in Bresco though the auspices of a funding agreement which was not merely champertous, but an abuse of process.

125. Whilst, as set out above, mere champerty is not an abuse of process, it is plain on the authorities that the establishment of champerty may be an element (substantial or otherwise) of that abuse. That element (at least) has been established through non-compliance of the agreement with the DBAR 2013. Whether the non-compliant funding agreement is also an abuse of process is a question of fact.

126. As set out above, I consider that (largely if not wholly as a consequence of the refusal to disclose the terms of the funding agreement), on the facts before the Court on this application, the matter of abuse of process cannot be satisfactorily disposed of. In circumstances where, by reason of its inferred non-compliance with the DBAR 2013 regulations, there is (to use the language of summary judgment) at least a realistic prospect of the Defendant establishing that the agreement is not merely champertous but an abuse of process.

127. There is insufficient evidence before me and there neither has been, nor can there be, full argument on the point. It would be wrong in these circumstances to grant summary judgment.

128. If I am wrong about that, I consider, for the reasons set out below, that (but for the issue of champerty), the Court would have allowed summary judgment, but issued a stay of execution.

F. Do the facts in this case amount to an exception?

129. Aside from the question of champerty, which I have dealt with in Section E above, there are particular issues which arise in this case for consideration. These are:

(1) Alleged inadequacy of the wording of the Pythagoras Capital Guarantee;
(2) Alleged inadequacy of Pythagoras to stand as guarantor;
(3) The fact that no ATE insurance has in fact been provided at the date of the application;
(4) The fact no offer of security was made prior to commencing adjudication;
(5) Other conduct.

Alleged inadequacy of the wording of the Pythagoras Capital Guarantee

130. As a matter of principle, I do not see any difficulty with the provision of a guarantee as part of a package of security seeking to meet the concerns expressed in *Bresco*.

131. At paragraph 51.4 of his skeleton, Mr Graham-Dixon raised concerns that the form of the Pythagoras Capital Guarantee was unclear. By reference to the amended guarantee set out in Pythagoras' letter of 5 August 2019 and quoted above, Mr Graham-Dixon queried paragraph 3(c), which referred to an adverse costs order in subsequent litigation to the extent that costs '*resulted from the Adjudication Decision being overturned*'. He rightly points out that the adjudication decision being overturned would itself be the result of the costs, not their cause. He queries, in addition, the utility of costs '*to be assessed if not agreed*', if it had been established that there was an entitlement to an adverse costs order.

132. Both these concerns are met by the way in which the type of security to be provided has been worded, in paragraph 87 above.

133. In terms of the duration of the security, in the ordinary case, it would seem likely that a period in the order of 6 months for the responding party to commence litigation would be appropriate. However, no doubt the appropriate period may be more or less depending upon the complexity of the underlying dispute and any other relevant circumstances. I would regard this as an appropriate period in this case. Any order would also have provided that the responding party had liberty to apply if particular reasons arose requiring an extension to the duration of security.

Adequacy of Pythagoras to stand as guarantor

134. As a matter of principle, if a party intends to provide a guarantee and expects that reliance will be placed on the guarantee in order for a Court to exercise a discretion it would not ordinarily exercise in its favour, the Court will consider whether the guarantor will be good for the guarantee.

135. This was accepted in principle by Ms White, who contended that the test would be effectively the same as principle (f) in *Wimbledon v Vago:* is there a probably inability on the part of the guarantor to pay on any guarantee? The Court, it is said, should

subject Pythagoras to the same level of scrutiny – insofar as they are clearly solvent and a going concern, the fact that they will be able to meet the guarantee can be presumed.

136. It seems to me that where the guarantee is, in place of ringfencing, providing security that the sum paid over would be capable of repayment at the end of litigation or arbitration, the nature of the guarantee must reflect the fact that it is offered in place of the absolute security a debtor has in its cross-claim. In these circumstances, the guarantee or bond should be from a bank or equivalent which provides a high degree of certainty that the guarantee will be called successfully.

137. In relation to the security for costs, in my judgment, there would also need to be a high level of certainty that the guarantor would make the guarantee good in order for the Court to take it into account. This is justified in circumstances where the ordinary position is that a company in liquidation would not have the benefit of pursuing or enforcing adjudication, and it is plain from *Bresco* that it is for the company to establish that the circumstances which exist to permit it to do otherwise are exceptional. Ordinarily, security for costs is made by making payment into a court, or the provision of a bank guarantee or bond. Whilst it is not a matter (at the moment) for decision by the Court, there is no obvious reason why the Court should approach the question of the nature of security differently to circumstances in which security is ordered as a condition of pursuing litigation.

138. No payment in, bank guarantee or bond of this nature is offered in this case.

139. Even were it appropriate in the ordinary case to look to a guarantee from the funder, the latest micro-accounts filed with Companies House record Pythagoras' net assets of £14,411. Evidence was provided by witness evidence showing a savings account showing £60,506.10, as at 22 July 2019, and a current account containing £13,995.44 as at 5 August 2019. I was provided with an updated bank account statement showing c.£120,000. However, a bank account is insufficient evidence to conclude that there would be a high level of certainty behind the guarantee.

140. In my judgment the position of Pythagoras is not such as to give the Court any real degree of certainty that, should the guarantee be called upon in 12 or 18 months for a significant adverse costs award, Pythagoras will have the financial wherewithal to pay an adverse order for costs.

141. I therefore accept HSMC's contention that the Pythagoras Capital Guarantee is not adequate, even in conjunction with an undertaking to ringfence the principal sum.

The fact that no ATE insurance has in fact been provided at the date of the application

142. In light of the position I have formed in respect of the adequacy of Pythagoras to stand behind the guarantee, it is not suggested that I could enforce the decision without an alternative way of securing the award and an adverse costs order.

143. It is suggested by Ms White that proceedings could be stayed until an ATE insurance policy is put in place.

144. This suggestion is met by Mr Graham-Dixon contending that:

(1) The proposed policy does not cover the judgment sum. In circumstances, however, where the policy is provided hand-in-hand with an undertaking from the liquidator with respect to ringfencing, this is not an answer to the principle established above;
(2) The proposal is presently too vague. The proposal that the Court (and the Claimant) wait until the provision of a policy either does or does not materialise and analyse the position afresh is inappropriate. This should not happen: instead, the application for summary judgment should simply be refused.

145. The issue does not arise in circumstances where I have already refused summary judgment. If, however, I had not, I would not have been prepared to take this suggested course. It seems to me that in circumstances where both parties were hitherto devoid of guidance on the circumstances in which a company in liquidation might enable itself to fall within an exception to *Bresco*, and where the arguments as to adequacy/inadequacy of security developed, the fairest outcome would have been to stay the application generally, but on terms that the present undertaking from Pythagoras as to the payment of costs of unsuccessfully applying for enforcement of the Adjudication is extended to any further application to lift the stay that this Court would have imposed.

Absence of security offered prior to commencing adjudication

146. Mr Graham-Dixon argues that Meadowside is seeking to reverse-engineer the utility of the adjudication by finding a way to make the adjudication in question compatible with the insolvency regime. No guarantee was offered prior to the adjudication, in which the Defendant chose not to participate on the basis that the adjudication was incompatible with the insolvency regime. It is contended that if Meadowside is successful, the prejudice caused to HSMC is irreversible.

147. In response, Ms White argues that the HSMC was given a full opportunity to participate and, for tactical reasons, chose not to engage. HSMC had principally argued that the Adjudicator did not have jurisdiction, and that argument was, it is now known, unfounded. It remained open at all times to participate under reservation, or, as happened in Bresco, to seek to injunct the adjudication. If this course of action had been taken, it is said that it would have provided Meadowside with an opportunity to consider procuring the Guarantee that has now been offered by Pythagoras. Moreover, it is pointed out that HSMC also chose, in a similar way, not to follow the procedures in Clauses 6.7.3 and 6.7.4 of the Contract requiring an account to be taken following the insolvency of the Contractor, which Mr Graham-Dixon accepted as a breach of contract.

148. The difficulty faced by both parties is that, at the time of the adjudication, the interaction between insolvency and adjudication was a developing area of law which, as Coulson LJ remarked at the outset in Bresco, has not remained free from doubt. It is right that the main basis upon which HSMC decided not to partake in the adjudication related to the jurisdiction of the Adjudicator, which in fact is a point upon which Pythagoras, and the Adjudicator were correct. It is also right, however, that without the offer of adequate security, any general argument that the decision would have been enforceable would have been unlikely to succeed.

149. The question therefore arises whether the prejudice alleged by HSMC would have amounted to a compelling reason to refuse summary judgment, or otherwise would have justified a stay when otherwise the Court would have been persuaded that the nature of the adjudication and the provision of adequate security rendered the case an exception to the ordinary position.

150. In my judgment, it would not. It was open to HSMC to take such course as it saw fit. Neither party foresaw how the law would develop, or anticipated the way in which the Court of Appeal have provided clarity in relation to jurisdiction and utility.

151. Insofar as there would have been any prejudice to HSMC (in circumstances where the decision was enforced), that would be significantly mitigated by the fact that (if sufficient financial safeguards had been in place), HSMC would have the opportunity to commence proceedings and establish, if able to do so, that the sum should be repaid; and have security for costs to enable it to enforce a relevant adverse costs order for doing so.

Other Conduct

152. In the witness statement of Mr Fletcher, on behalf of HSMC, various complaints were made about the way in which Pythagoras conducted the pursuit of the debt. These were not relied upon in either of the written or oral submissions of Mr Graham-Dixon, I think rightly so. Having reviewed the relevant correspondence, I do not consider that the way in which Pythagoras has conducted its pursuit of the claim, either before or after the adjudication, would amount to matters which would provide any compelling reason not to grant summary judgment if that is the course I was otherwise going to take. By way of example only, I do not consider that it was (as alleged) misleading not to have provided to the Adjudicator correspondence which Russell-Cooke chose to send only to Pythagoras, in circumstances where Pythagoras asked the specific question raised by the Adjudicator accurately, and knew that the Adjudicator was well aware of the existence and substance of HSMC's cross-claims.

G. Conclusion

153. For the reasons set out above, I refuse Meadowside's application for summary judgment.