[2020] EWHC 2451 (TCC)

Case No: HT-2020-000137

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**TECHNOLOGY AND CONSTRUCTION COURT (QB)**

Rolls Building
London, EC4A 1NL

Date: 14 September 2020

**Before** :

**THE HONOURABLE MR JUSTICE FRASER**

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**Between :**

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| **JOHN DOYLE CONSTRUCTION LIMITED (in liquidation)** | **Claimant** |
| **- and -** | |
| **ERITH CONTRACTORS LIMITED** | **Defendant** |

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**Helena White** (instructed by **Pinsent Masons LLP**) for the **Claimant**
**Riaz Hussein QC** (instructed by **DLA Piper UK LLP**) for the **Defendant**

Hearing date: 2 July 2020
Draft distributed to parties: 9 September 2020

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# JUDGMENT

**Mr Justice Fraser:**

***Introduction***

1. This is a claim for enforcement of an adjudicator's decision by way of summary judgment under CPR Part 7, in proceedings issued by John Doyle Construction Ltd ("JDC"). JDC is a company which is in liquidation, and has been since 2013. The Defendant, Erith Contractors Ltd ("Erith") opposes summary judgment on a number of different grounds.

2. Adjudication has always been seen as designed to provide the speedy, interim resolution of disputes under construction contracts, to preserve cash flow for the industry, and to permit the parties to proceed to a final resolution of that dispute. During that process, the parties observe the decision of the adjudicator unless or until it is overturned by a judgment, or the award of an arbitrator. Adjudication has developed since it was first introduced, and Lord Briggs recently stated the following:

   "But solving the cash flow problem should not be regarded as the sole objective of adjudication. It was designed to be, and more importantly has proved to be, a mainstream dispute resolution mechanism in its own right, producing de facto final resolution of most of the disputes which are referred to an adjudicator."

   This is taken from [13] in the decision of the Supreme Court in ***Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd (in liquidation)*** [2020] UKSC 25, a decision considered in some detail below.

3. The London Olympics in 2012 seem a long time ago, when one looks back eight years to how the world was then. Certainly, one might have thought that any disputes under the construction contract between Erith and JDC for the landscape works at the Olympic Park for the London 2012 Olympic Games would have been finally resolved by 2020. Not so in this case. The claim brought by JDC against Erith in the adjudication was for sums JDC claimed to be due on its Final Account for hard landscaping works at the Olympic Park, performed before the 2012 Olympic Games. JDC entered administration on 21 June 2012. JDC then entered creditors voluntary liquidation on 13 June 2013. JDC commenced the adjudication, leading to the decision which is the subject matter of these proceedings, on 22 January 2018. The claim was for approximately £4 million, and the adjudicator awarded JDC the sum of £1.2 million approximately, including VAT and interest.

4. As will be seen from the procedural history that follows, delay during the period from July 2018 to July 2020 can be explained by the developing law concerning the rights of companies in liquidation to adjudicate disputes at all. However, the period between June 2012 and commencement of the adjudication in January 2018 was neither caused, nor contributed to, by such matters. The period of five and a half years from mid-2012 to early 2018 in respect of the works at the Olympic Park was caused by quite different matters, as will be seen by the section of this judgment headed "The involvement of Henderson Jones" below. It is not even accepted by Erith that it is JDC bringing these proceedings, rather than the company called Henderson & Jones Ltd ("Henderson Jones") that has acquired rights to the dispute from the liquidator of JDC. Erith point to the fact that the bulk of the spoils of any judgment in JDC's

favour will go to Henderson Jones, not to the liquidator, as one of the reasons why summary judgment should be refused. This will be addressed further below.

5. The hearing of the contested summary judgment application by JDC was set down for Wednesday 17 June 2020 at 10.30am. Somewhat coincidentally, a few days before that, the Supreme Court announced that it would hand down its decision in ***Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd (in liquidation)*** [2020] UKSC 25 on the same date, and at the same time, as that hearing. Accordingly, the hearing of this claim for summary judgment was postponed until 2 July 2020 so that both the parties and the court could take account of, and follow, the Supreme Court's decision in that case. Although that decision will be considered in far greater detail below, the Supreme Court allowed the appeal by Bresco. Lord Briggs stated both that companies in liquidation had the right to adjudicate disputes, and also that the problems caused by liquidation identified by the Court of Appeal both in an earlier case, ***Bouygues (UK) Ltd v Dahl Jensen (UK) Ltd*** [2000] EWCA Civ 507, and ***Lonsdale v Bresco*** [2019] EWCA Civ 27 itself, could all be considered at the enforcement stage. Both the court at first instance and the Court of Appeal in ***Lonsdale v Bresco*** had found, albeit by different routes, that a party facing an adjudication brought by a company in liquidation was entitled to an injunction to prevent this, because the decision of the adjudicator would not be enforced by the courts. The granting of an injunction to prevent a company in liquidation from bringing adjudication proceedings was overturned by the Supreme Court in that case.

6. Thus it is that, shortly after the Supreme Court judgment in ***Lonsdale v Bresco***, the court is faced with distilling or applying the principles that govern a party in liquidation seeking to enforce an adjudicator's decision in its favour by way of summary judgment. Regardless of the answer to that issue, the streamlined and fast-track procedure in the Technology and Construction Court for enforcement of adjudicator's decisions was not designed to deal with the sort of issues that arise where decisions are (as this one is) years, not months, old; nor that are made in respect of construction operations and disputes that are themselves (as this one is) eight years old. This is a procedural observation, but such older background matters may not be suited in all cases to the very rapid judicial enforcement currently available in the TCC for all adjudication business, a procedure that has been refined over the last two decades to mirror the ethos of the Housing Grants, Construction and Regeneration Act 1996 that intended adjudication to be a speedy remedy. This is a subject to which I shall return at the end of this judgment.

7. Both parties submitted a much larger number of witness statements than would ordinarily be expected on an application such as this. These were one witness statement from Mr Joyce, JDC's solicitors; three from Mr Shaw, Erith's solicitors; one from Mr Menzies, a director of Erith (who had, some years ago, been employed by JDC); three from Mr Henderson (whose involvement is explained further below); and two from Mr Hawes (partner at Deloittes LLP and Joint Liquidator of JDC). Some of the witness statements contained extensive argument. Notwithstanding the importance to both parties of the outcome of this summary judgment application, such a volume of evidence is not necessary. Submitting more numerous, and longer, witness statements than necessary is a temptation that parties generally seem unable to resist. I will only deal with such aspects of the evidence as are necessary in order to resolve this application.

8. Finally, at the end of the oral hearing, I invited short further written submissions from both parties on one particular aspect of the Supreme Court decision in ***Lonsdale v Bresco***, namely the reference by Lord Briggs at [64] to the dicta of Chadwick LJ in ***Bouygues v Dahl Jensen*** to which I have already referred at [5] above.

***The History***

9. BAM Nuttall Ltd ("BAM") was engaged by the Olympic Development Authority ("ODA") as a Management Contractor to perform certain construction works for the construction of the Olympic Park and other works necessary for London to hold the 2012 Olympic Games. BAM required a trade contractor to perform the necessary hard landscaping works for the northern part of the Olympic Park, called Olympic Park North. Erith was pre-qualified by BAM to tender for such works; JDC was not. The trade contract was to include all supervision and resources necessary to perform the works. The contract form, as for all contracts for the London Olympics, was to be the NEC3 Subcontract.

10. Erith therefore tendered for the works, as it was entitled to do, but in agreement with JDC that the works would be performed – either substantially or wholly, depending upon the different parties' points of view – by JDC. Mr Menzies described this as a "joint tender". I doubt that it was described in those terms to BAM, although that does not matter. However the tender was described at the time, Erith entered into the subcontract with BAM and the works commenced, a great amount of those works being performed by JDC.

11. The contract between Erith and JDC was on the NEC3 form, Priced Contract with Activity Schedule, including the ODA standard additional clauses and amendments, Option W2 and Secondary Options as listed ("the subcontract"). The precise terms of the contract are not relevant for these purposes, and it is common ground that clause W2 included an adjudication clause. The appointing body for adjudication was identified in the subcontract as the ICE. The contract was entered into in July 2010. The precise date does not seem to be available.

12. It is common ground that JDC performed a substantial amount of work, and went into administration with Deloittes being appointed as administrators on 21 June 2012. Deloittes subsequently, in June 2013, were involved in the appointment of the liquidators, all of whom were or are partners of Deloittes. The two joint liquidators currently are Mr Hawes and Mr Cowlishaw. Mr Menzies of Erith explains that he had realised a few months before June 2012 that JDC had, as he puts it, "been struggling financially". He also asserts that Erith "had to step in and complete the works", although two points are relevant in that respect. Firstly, the London Olympics actually started on 27 July 2012, so there was not much time between the administration of JDC and commencement of the Olympic Games. Secondly, even Mr Menzies estimates that the costs expended by Erith in doing so were only about £75,000. This is a far lower sum than the one sought in the adjudication by JDC. The short period of time, and the relatively modest level of completion costs, suggests that only limited works were outstanding when JDC went into administration, but that is merely an impression.

13. Thereafter, firstly as administrators and then as liquidators, Deloittes attempted to agree with Erith the amount of payment outstanding to JDC on the Final Account.

This did not lead to any agreement, and at one stage BAM became involved, eventually disclosing the amount actually paid to Erith for the works. The liquidators made an application to the court under section 236 of the Insolvency Act to compel the production of information about the Final Account between BAM and Erith. The evidence before me says that this occurred in June 2014, based on correspondence about it. The liquidators cannot produce a copy of the order of the court, because after this period of time it cannot be found; however, it is admitted by Erith that this had to be done.

14. The information obtained from BAM led the liquidators to conclude that there was a valid claim against Erith with a reasonable prospect of success. Mr Hawes says in his witness statement that it was "established that Erith was a debtor to JCD in the sum of c £1.2 million after discounts deducted". That evidence is somewhat at odds with the claim of over £4 million brought by JDC in the adjudication, but for present purposes that does not much matter.

15. However, Mr Hawes said in his evidence that pursuing a Final Account adjudication against Erith would be expensive and so "balancing the risks of pursuing the matter directly and our duty to realise all assets for the benefit of creditors, the decision was made to contact third-parties and enquire as to the terms of any sale, assignment or any other solution in respect of the claim". The liquidators were, therefore, introduced to Henderson Jones, who Mr Hawes refers to in the following terms, were chosen due to their having a "reputation in the marketplace, their expertise in dealing with contentious insolvency claims and ability to pursue recoveries for the creditors of insolvency estates".

16. There are two observations that are pertinent at this point. Firstly, the decision by Mr Hawes that pursing an adjudication would be expensive is, without further explanation, difficult to reconcile with the adjudication that was eventually commenced in 2018, ostensibly by JDC. Ordinarily one would expect that to be because Henderson Jones conducted the adjudication, but Henderson Jones are more than a little coy about what they have in fact been doing. They claim that they have not been acting as legal advisers in either the adjudication or the litigation. In the adjudication, JDC was represented by Gowling WLG (UK) LLP. Secondly, the conclusion that an adjudication with Erith would be expensive is also difficult to reconcile with both the ethos of adjudication, and also all the authorities on adjudication decision enforcement over the last twenty years. The whole point of adjudication is that it is *not* expensive (or certainly, it is not supposed to be). It is supposed to be a quick and relatively cheap way of having a dispute resolved on a "temporarily final" basis, with the parties observing the decision until the dispute is resolved with finality (in litigation or arbitration) or the parties agree a broader, final outcome (which may include other disputes between them). It would doubtless involve the expenditure of some professional fees, and (potentially) the costs of the adjudicator, but with a decision potentially available within 28 days, such costs exposure is not likely to be great.

17. However, regardless of that, the liquidators decided not to commence an adjudication. It is at this point that Henderson Jones enter the scene. The liquidators contacted Henderson Jones in August 2016. The involvement of Henderson Jones is heavily criticised by Erith in these proceedings. For reasons more fully explained below, the

involvement of Henderson Jones and the agreements between it and the liquidators have to be considered in some detail.

***The involvement of Henderson Jones***

18. Henderson Jones was founded by Mr Henderson and Mr Jones. Mr Henderson is a director of Henderson Jones, and also a qualified solicitor and practising solicitor-advocate. He founded Henderson Jones in 2016 which is when it started trading. This appears, on the dates, to be not a great period of time prior to his being contacted by the liquidators of JDC, so Mr Henderson and Mr Jones must have built up a good reputation very quickly in this particular field. In any event, Henderson Jones' activities are described by Mr Henderson in the following way. I will quote from his first witness statement as this is relevant to some of the points relied upon by Erith.

"The primary business of H&J is to purchase legal claims from insolvent companies….. H&J provides a solution, by purchasing the claim from the [Insolvency Practitioner] and/or insolvent company, and commencing proceedings itself. The Insolvency Estate will receive some mixture of upfront cash consideration and deferred consideration, calculated and paid by reference to the eventual outcome." (emphasis added)

The Henderson Jones website states that "H&J purchases litigation and arbitration claims for immediate money and/or a share of the proceeds." This is relied upon by Erith as part of its case in resisting enforcement.

19. In this case, that is what was done, or at least what was intended. The liquidators and Henderson Jones entered into a Deed of Assignment dated 8 December 2016. However, this assignment did not take effect as a legal assignment because the bespoke NEC3 terms and conditions that actually applied to the subcontract contained an express non-assignment clause. Erith refused to provide its consent to allow the assignment to take effect, in any event.

20. There is something of a side issue between the parties about this prohibition on assignment. Mr Hawes, the joint liquidator, said he had no knowledge that there was such a term in the subcontract when this Deed was executed in 2016, and Mr Henderson says that he did not know of its existence until mid-2017. This must mean that neither of them read the subcontract when claims under it were assigned from the liquidators to Henderson Jones. Regardless of their state of knowledge of the subcontract terms at the time (and I find that this too, in any event, does not matter for present purposes), the agreement between JDC, the liquidators and Henderson Jones was recorded in a written instrument called the Deed of Assignment ("the Deed").

21. The Deed has a number of detailed terms. I shall not reproduce them all. The most relevant ones are as follows. Recital C of the Deed states that:
"Following the assignment, H&J intends to take all reasonable steps to pursue the Assigned Claims and to achieve a recovery."

22. Under clause 1.1, the following definitions were provided amongst others:
***"Assigned Claims"*** means:
    a) All debts, actions, claims, rights, demands and set-offs that the Company has against the Defendants that it is legally possible to assign

and/or transfer the interest in by way of trust. Including (for the avoidance of doubt) the entitlement to any proceeds, fruits, damages, or compensation arising from such claims, or relief consequent on such claims.

b) Assigned Claims includes (but is not limited to) claims arising from and in connection to monies owed from the Defendants in relation to the Olympic Park Landscaping contract and all work done on that project."

***"Consequent Proceedings*** means any Proceedings pursued by H&J, in relation to the Assigned Claims."

***"Costs*** means any and all reasonable costs, liabilities, expenses, or disbursements incurred by H&J in pursuing the Assigned Claims (including but not limited to travel costs, court fees, insurance costs, payment of orders in relation to costs, counsel's costs, external solicitors' costs, and experts' costs) but not including the cost of time spent by H&J employees."

***"Defendants*** means Erith Contractors Limited, Erith Group Limited and their Affiliates, Paul Nurton."

***"Deferred Consideration*** means 45% of any Net Recovery, payable by H&J under clause 24.b)."

***"Net Recovery*** means any recovery less any costs".

23. Clause 3.1 provided:

"3.1 In the event that, for any reason, the Assigned Claims are not effectively legally assigned to H&J by this Deed, then:

i) The Liquidators and the Company shall hold the Assigned Claims on trust for H&J absolutely (the Assigned Claim trust, or "***AC Trust***");

ii) It is agreed that the Liquidators and the Company shall not bring proceedings against the Defendants in relation to the Assigned Claims, and therefore consent to H&J bringing proceedings in its own name against the Defendants;

iii) If it is necessary or desirable for the Company to be joined in any Consequent Proceedings brought by H&J as beneficiary, then the Company shall join the proceedings and shall appoint H&J as its attorney to take any necessary steps in the proceedings."

24. Clause 4 was headed "Price" and stated the following:

"4.1 In consideration of the Assignment, H&J agrees to pay to the Company:

a) £6,500 within 5 Business Days of entering into this Deed; and

b) Within 20 Business Days of a Net Recovery being received by H&J, H&J shall pay an amount equal to 45% of the Net Recovery to the Company, or to other person(s) designated by the Liquidators in accordance with clause 4.1(c) and by providing written notice to H&J in accordance with clause 13.1 (the ***Deferred Consideration***).

c) The Liquidators may nominate one or more person (including bodies of persons corporate or unincorporated) to receive payment of the Deferred Consideration. Such persons nominated by the Liquidators may receive different amounts or percentages of the Deferred Consideration, as directed by the Liquidators. H&J will make payment of the Deferred Consideration as directed by the Liquidators, provided that the directions of the Liquidators are clear, unambiguous and do not involve any exercise of discretion or judgment by H&J. When nominating persons to receive payment of the Deferred Consideration, the Liquidators must provide the following relevant details to H&J:
   i) Name;
   ii) Address (registered address if a company);
   iii) Company number (if applicable); and
   iv) Bank account details (if available).

d) Once a Net Recovery has been received by H&J, the Deferred Consideration payable under clause 4.1(b) shall be held on trust by H&J for the Company, or other person(s) designated by the Liquidators, until payment is made as per 4.1.

e) It is agreed and acknowledged that payment of the Deferred Consideration to a person or persons nominated by the Liquidators pursuant to clause 4.1 shall constitute a good discharge of H&J's liability to the Company.

f) For the avoidance of any doubt, the Liquidators, the Company and H&J make no warranty or representation as to the amount of any Net Recovery that might be made (if any).

g) H&J agrees that in the event of a Net Recovery it will make reasonable efforts promptly to pay in accordance with 4.1 (including in circumstances where a further Net Recovery may be made).

h) H&J agrees that it will not sell the Assigned Claims or its interest in them pursuant to the AC Trust, other than for a reasonable cash amount."

25. Clause 8 states that:

"8.1 <u>The conduct and control of any Consequent Proceedings (including, but not limited to, decisions to commence, settle, discontinue, or abandon the Consequent Proceedings) will be at the absolute discretion of H&J. Neither the Company nor the Liquidators shall have any right to exercise any control over any Consequent Proceedings or be involved in the decision making process</u>.

8.2 H&J shall not be obliged to provide any information to the Company or the Liquidators in relation to any Consequent Proceedings other than:

a) notice of any Net Recovery being received and the final outcome of any Consequent Proceedings, within 5 days of such outcome (whether the Consequent Proceedings are abandoned, discontinued, compromised, settled, or resolved by a judgment, arbitration, or other determination);

b) updates on the progress of any Consequent Proceedings, necessary to allow the Liquidator to make appropriate reports to creditors.

8.3 H&J shall have no duty to the Company or the Liquidators to make or maximise a Net Recovery, or to seek any particular outcome or result in Consequent Proceedings, or to pursue any Consequent Proceedings at all.

8.4 H&J shall take all reasonable steps to ensure that any Consequent Proceedings are conducted properly and in accordance with any relevant professional standards."

(emphasis added)

26. Therefore, in summary only, the following pertinent points arise as a result of the operation of the Deed:
1. The Deed envisaged that the assignment might not lead to an effective legal assignment, and in those circumstances provided that the claims would be held on trust for Henderson Jones.
2. Henderson Jones paid JDC £6,500 for the assigned claims, with further payment to JDC dependent upon outcome;
3. Henderson Jones had conduct and control of any proceedings pursued in relation to the assigned claims;
4. Recovery of any claims were to be paid to Henderson Jones;
5. 45% of net recovery in those subsequent proceedings (meaning recovery less costs) were to be paid out to JDC by Henderson Jones;
6. Henderson Jones would therefore retain 55% of the net recovery.

27. So far as conduct and control is concerned, "Consequent proceedings" is defined as proceedings pursued by Henderson Jones. Clauses such as clauses 3.1 and 8.1, and Recital C, make it clear that Henderson Jones are not only the entity that will be primarily involved, but were to be wholly in charge and neither the company nor the liquidators have any right even to be involved in making decisions in respect of these.

28. Erith criticise the arrangement between JDC, the liquidators and Henderson Jones as being contrary to the Damages Based Agreements Regulations 2013 ("the 2013 Regulations"). Regulation 4 of the 2013 Regulations states the following:
"(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."
This is a point considered further below at [93].

29. The Deed of Assignment was followed by a Deed of Agreement, entered into between the same parties and dated 13 December 2019. This agreement was entered into in order to avoid some criticisms of this type of arrangement. These criticisms are indeed raised by Erith following the adjudication and in these proceedings, although that criticism could potentially have been predicted, due to the judgment handed down in October 2019 in another case called ***Meadowside Buildings Development Ltd (in liquidation) v 12-18 Hill Street Management Co Ltd*** [2019] EWHC 2651 (TCC), a decision of Mr Recorder Constable QC sitting in the High Court. I will return to that decision in greater detail below. It is unnecessary to recite the terms of the Deed of Agreement in any detail. They were plainly intended to avoid the arrangement between JDC and Henderson Jones being found to be similar to other arrangements in the ***Meadowside*** case. Those arrangements were held by Mr Constable QC to be

contrary to the 2013 Regulations and also, in the alternative, champertous. Whether that was the intention behind the liquidators and Henderson Jones in entering to the Deed of Agreement or not in the instant case, the parties entered into the Deed of Agreement some time after the Deed of Assignment, and after the decision in ***Meadowside***.

30. One clause of the Deed of Agreement, clause 2, amended the definition of Recovery in the Deed of Assignment. Another, clause 3 headed "Status of Relationship", sought to identify or specify what the relationship was between the company, the liquidators and Henderson Jones. There had been a similar provision in clause 7 of the Deed of Assignment. In particular, clauses 3.3 and 3.4 of the Deed of Agreement stated:

"3.3 H&J has not and will not provide any legal advice or legal services, or services or advice of any other kind (including administration or debt collection services or financial services/assistance) to the Company or the Office Holders or any of their Affiliates; and

3.4 H&J has not and will not carry out any Legal Activities, Reserved Legal Activities, or Prohibited Separate Business Activities for or on behalf of the Company or the Office Holders or any of their Affiliates".

31. To put what has occurred into context, the following dates and events are relevant. Limitation has not been argued by either party and therefore can be assumed not to arise in this case.
1. The works took place, and JDC entered administration, in 2012.
2. In 2013 JCD went into liquidation, and in December 2016 the liquidators entered into the Deed of Assignment with Henderson Jones.
3. On 22 January 2018 the adjudication was commenced.
4. On 15 June 2018 Mr Aeberli, the adjudicator appointed by the ICE, decided the dispute, and on 29 June 2018 he corrected his decision in certain non-material respects.
5. On 31 July 2018 judgment at first instance was handed down in ***Lonsdale v Bresco*** [2018] EWHC 2043 (TCC). In those proceedings I granted an injunction preventing continuation of an adjudication by a company in liquidation, holding that there was no jurisdiction on the part of the adjudicator as a result of the insolvency.
6. On 1 January 2019 the Court of Appeal handed down its judgment in ***Bresco v Lonsdale*** [2019] EWCA Civ 27. Coulson LJ delivered the unanimous judgment of the court, found that there *was* jurisdiction on the part of the adjudicator if a company was in liquidation, but upheld the grant of the injunction on the grounds that the utility of the situation was such that the court would not enforce a decision in such circumstances.
7. On 10 October 2019 judgment was handed down in ***Meadowside v Hill Street Management*** [2019] EWHC 2651 (TCC). Mr Recorder Constable QC found that, in some circumstances, insolvent parties could put themselves within what he called "the exception in ***Bresco***" and provide adequate security for later repayment of a sum awarded in an adjudicator's decision. However, he did not order summary judgment in that case, and also found the specific arrangements entered into between the company in liquidation and a third party (in a similar though not identical position to Henderson Jones) to be contrary to the 2013 Regulations and champertous.
8. On 13 December 2019 the liquidators, Henderson Jones and JDC entered into the Deed of Agreement. On 20 December 2019, JDC's solicitors wrote and offered

security to Erith by way of both a letter of credit and ATE insurance in respect of any potential repayment that might be required as a result of any substantive proceedings.
9. On 9 April 2020 JDC issued the claim form seeking to enforce the decision in its favour from June 2018.
10. On 17 June 2020 the Supreme Court overturned the Court of Appeal decision in ***Bresco***, allowing a company in liquidation to bring its dispute to adjudication. It did, however, also state per Lord Briggs at [64] that:
"The reasons why summary enforcement will frequently be unavailable are set out in detail in ***Bouygues (UK) Ltd v Dahl Jensen (UK) Ltd*** [2000] EWCA Civ 1041, paragraphs 29-35 per Chadwick LJ. As he says, the court is well-placed to deal with those difficulties at the summary judgment stage, simply by refusing it in an appropriate case as a matter of discretion, or by granting it, but with a stay of execution."

32. There are two different routes to potential enforcement that must be considered on this application. The first is whether a company in liquidation such as JDC is entitled to summary judgment at all. The second is if it is, whether a stay of execution should be granted. Those two routes may lead to the same outcome, but whether that is right or not, they consider some if not all of the same matters. For parties such as JDC and Erith, it is the overall outcome that is important.

33. I will therefore consider the issue of summary judgment first. The question of a stay would only arise if JDC succeeded in obtaining summary judgment.

34. The main point to consider therefore is identification of the principles that should be applied by the court when considering an application for summary judgment, given Lord Briggs' dicta in ***Bresco***, and his approval of Chadwick LJ in ***Bouygues.***

35. The first matter that must be addressed in any case concerning an opposed enforcement of an adjudicator's decision is whether the adjudicator's decision is a valid one. By "valid" I mean that the decision is one that has been made within the adjudicator's jurisdiction, and without material breaches of natural justice. Both of those are essential ingredients for enforcement. No such issues arise in the instant case, and so I consider the issues below taking that into consideration. This will not necessarily be the situation in every such case, however. If challenges based on jurisdiction of the adjudicator, and material breaches of natural justice, arise, they would have to be dealt with first by the court at the enforcement stage. The following issues will only arise if any jurisdictional and natural justice challenges are resolved in the referring party's favour.

36. I consider the following three issues arise on this application:

1. In what circumstances will a company in liquidation be entitled to summary judgment on a valid adjudicator's decision in its favour?

2. Are those circumstances present here, such that JDC is entitled to summary judgment?

3. If so, should the court order a stay of execution, as was done in ***Bouygues v Dahl Jensen***, in light of the Supreme Court decision in ***Bresco*** and applying the principles

in ***Wimbledon Construction Company 2000 Ltd v Derek Vago*** [2005] EWHC 1086 (TCC)?

***Issue 1 In what circumstances will a company in liquidation be entitled to summary judgment on a valid adjudicator's decision in its favour?***

37. The correct authorities to consider are the two decisions of the Court of Appeal that have already been touched upon (***Bouygues*** and ***Bresco***), and the Supreme Court in ***Bresco.*** Because that latter case concerned whether a company in liquidation could adjudicate at all, rather than whether it could obtain summary judgment on a decision in its favour, then although guidance is provided on enforcement, it is not the central plank of the case before me, nor is it materially relied upon by either party. It is, however, an obviously important decision and must be considered in detail.

38. The first decision in time is that of Chadwick LJ in ***Bouygues v Dahl Jensen.*** The decision dates from July 2000, but obviously holds good given the statement by Lord Briggs in ***Bresco*** in July 2020. The relevant passages from Chadwick LJ's judgment are as follows:

"[29] The second question raised by the appeal is whether the judge was right to give summary judgment to Dahl-Jensen for the amount which the adjudicator had decided Bouygues should pay. In the ordinary case I have little doubt that an adjudicator's determination under section 108 of the 1996 Act, or under contractual provisions incorporated by that section, ought to be enforced by summary judgment. The purpose of the Act is to provide a basis upon which payment of an amount found by the adjudicator to be due from one party to the other (albeit that the determination is capable of being re-opened) can be enforced summarily. But this is not an ordinary case. At the date of the application for summary judgment - indeed at the date of the reference to adjudication - Dahl-Jensen was in liquidation.

[30] In those circumstances rule 4.90 of the Insolvency Rules 1986 has effect.
The rule is in these terms, so far as material:
"(1) This rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation.

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

(3) ...

(4) Only the balance (if any) of the account is provable in the liquidation. Alternatively (as the case may be) the amount shall be paid to the liquidator as part of the assets."

[31] That rule is made under section 411 of the Insolvency Act 1986. Subsection (2) of that section - and Schedule 8, paragraph 12 - provide that the Lord Chancellor may make provision by rules or regulations as to the debts that may be proved in the winding up. There is no doubt that the rule has statutory force. It applies wherever

there have been mutual dealings, giving rise to mutual obligations and mutual credits, between a company which subsequently goes into liquidation and another party.

[32] The effect of the rule was explained by Lord Hoffman in his speech in the House of Lords in ***Stein v Blake*** [1996] 1 AC 243. In that appeal Lord Hoffman was addressing the provisions of section 323 of the Insolvency Act 1986, which is applicable in an individual insolvency or bankruptcy. But the provisions of section 323 of the Act and Rule 4.90 of the Rules are indistinguishable. The rule-making body, in 1986, incorporated into corporate insolvency provisions which had, for many centuries, been part of the law in relation to individual bankruptcy. What Lord Hoffman had to say about section 323 of the Act is equally applicable to corporate insolvency; to which rule 4.90 applies. At page 251 D-F Lord Hoffman explained the difference between bankruptcy set-off and legal set-off outside bankruptcy:
"Bankruptcy set-off, on the other hand, affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for or pay only the balance. So in ***Forster v Wilson*** (1843) 12 M & W. 191, 204, Parke B said that the purpose of insolvency set-off was 'to do substantial justice between the parties'. Although it is often said the justice of the rule is obvious, it is worth noticing that it is by no means universal. It has however been part of the English law of bankruptcy since at least the time of the first Queen Elizabeth."

[33] The importance of the rule is illustrated by the circumstances in the present case. If Bouygues is obliged to pay to Dahl-Jensen the amount awarded by the adjudicator, those monies, when received by the liquidator of Dahl-Jensen, will form part of the fund applicable for distribution amongst Dahl-Jensen's creditors. If Bouygues itself has a claim under the construction contract, as it currently asserts, and is required to prove for that claim in the liquidation of Dahl-Jensen, it will receive only a dividend pro rata to the amount of its claim. It will be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim.

[34] Lord Hoffman pointed out, at page 252 of ***Stein v Blake*** that the bankruptcy set-off requires an account to be taken of liabilities which at the time of the bankruptcy may be due but not yet payable, or which may be unascertained in amount or subject to contingency. Nevertheless, the insolvency code requires that the account shall be deemed to have been taken, and the sums due from one party shall be set off against the other, as at the date of insolvency order. Lord Hoffman pointed out also that it was an incident of the rule that claims and cross-claims merge and are extinguished; so that, as between the insolvent and the other party, there is only a single claim - represented by the balance of the account between them. In those circumstances it is difficult to see how a summary judgment can be of any advantage to either party where, as the 1996 Act and paragraph 31 of the Model Adjudication Procedure make clear, the account can be reopened at some stage; and has to be reopened in the insolvency of Dahl-Jensen.

[35] Part 24, rule 2 of the Civil Procedure Rules enables the court to give summary judgment on the whole of a claim, or on a particular issue, if it considers that the defendant has no real prospect of successfully defending the claim and there is no

other reason why the case or issue should be disposed of at a trial. In circumstances such as the present, where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in the liquidation, in which full account can be taken and a balance struck. That is what rule 4.90 of the Insolvency Rules 1986 requires.

[36] It seems to me that those matters ought to have been considered on the application for summary judgment. But the point was not taken before the judge and his attention was not, it seems, drawn to the provisions of the Insolvency Rules 1986. Nor was the point taken in the notice of appeal. Nor was it embraced by counsel for the appellant with any enthusiasm when it was drawn to his attention by this Court. In those circumstances - and in the circumstances that the effect of the summary judgment is substantially negated by the stay of execution which this court will impose - I do not think it right to set aside an order made by the judge in the exercise of his discretion. I too would dismiss this appeal."

39. Even though the relevant Insolvency Rules 1986 are now a later version, namely the Insolvency (England and Wales) Rules 2016 ("the 2016 Rules"), the above ratio is still valid. The 2016 Rules were the applicable ones in the ***Bresco*** case, and no distinction was made by Lord Briggs at [64] when he confirmed that the analysis of Chadwick LJ was still good law and should be considered.

40. The second decision is that of Coulson LJ in ***Bresco v Lonsdale*** [2019] EWCA Civ 27 itself. At [3] he described the issues in that case as follows:

"[3] The *Bresco* appeal raises directly the issue of whether an adjudicator can ever have the jurisdiction to deal with a claim by a company in insolvent liquidation. But there was also a related issue, concerned with whether (assuming that the adjudicator had the necessary jurisdiction) such an adjudication could ever have any utility and, if not, whether an injunction preventing the continuation of what would be a futile exercise was justified in any event."

41. That latter sentence makes it clear that the Court of Appeal in that case, when considering utility, took into account the same considerations and principles as would be taken into account when considering whether a company in liquidation can enforce an adjudicator's decision by way of summary judgment in its favour. At [37] and [38] Coulson LJ stated the following:

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

[38] This incompatibility can be seen in the different processes that each regime entails; in a comparison of the results that may be available; and in a consideration of the wider issues that could arise if companies in insolvent liquidation regularly sought to refer claims to adjudication."

42. This analysis continued, with the following passages:

"[43] This incompatibility is also demonstrated by looking 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. As Chadwick LJ pointed out in *Bouygues* (paragraph 20 above), if Bouygues had to prove their claim in Dahl-Jensen's liquidation, it would only receive a dividend, and would be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim. Lonsdale would be exposed to precisely the same danger here if they sought to prove their own claim (paragraph 10 above) in Bresco's liquidation. For that reason, Chadwick LJ said that, ordinarily, summary judgment to enforce the adjudicator's decision would not be available. He only upheld the order for summary judgment in that case because the point had not been taken before the judge and he could achieve the necessary result by staying execution.

[44] The point about the lack of utility of an adjudication involving a company in liquidation was also picked up by HHJ Purle in *Philpott*. In that case, at [30], he said: "The adjudication will produce at most a temporary obligation, more in the nature of an interim payment. However the contractual right to an adjudication is there. Whether or not the court would enforce any order against the company seems inconceivable, as this would defeat the requirement of *pari passu* distribution, and it may therefore that were the school to make an adjudication application, that might be met by an application for a stay by the liquidators on conventional insolvency grounds."

[45] Accordingly, these authorities acknowledge that a decision of an adjudicator in favour of a company in liquidation, like Bresco, would not ordinarily be enforced by the court. HHJ Purle said such enforcement was "inconceivable"; that may put it too high but, in my view, judgment in favour of a company in insolvent liquidation (and no stay), in circumstances where there is a cross-claim, will only be granted in an exceptional case. Indeed, on behalf of Bresco, Mr Arden QC appeared to accept that either a refusal of summary judgment or a stay was the most likely outcome in such a situation.

[46] As a result of this, I consider that Mr Crangle was right to say that a reference to adjudication of a claim by a contractor in insolvent liquidation, in circumstances where there is a cross-claim, would be incapable of enforcement and therefore "an exercise in futility".

(emphasis added)

43. The Supreme Court found that there was no such incompatibility. Lord Briggs, having identified some similarities between adjudication and the exercise upon which a liquidator is engaged in taking an account, considered these passages in detail. In a section of the judgment entitled "Futility", Lord Briggs analysed at [54] to [67] the

competing arguments and the conclusions of the Court of Appeal on utility. Lord Briggs stated the following:

"[60] That very steep hurdle is not surmounted, either generally (in the context of insolvency set-off) or on the particular facts of this case. For reasons already explained it is simply wrong to suggest that the only purpose of construction adjudication is to enable a party to obtain summary enforcement of a right to interim payment for the protection of its cash flow, although that is one important purpose. In the context of construction disputes adjudication has, as was always intended, become a mainstream method of ADR, leading to the speedy, cost effective and final resolution of most of the many disputes that are referred to adjudication. Dispute resolution is therefore an end in its own right, even where summary enforcement may be inappropriate or for some reason unavailable.

[61] Nor is there any basis for a conclusion that this beneficial means of dispute resolution is incompatible with the insolvency process, or with the requirement to deal with cross-claims in insolvency by set-off, still less an exercise in futility. First, as already described, the process of proof of debt in insolvency shares many of the attractive features of adjudication, in terms of speed, simplicity, proportionality and economy, but adjudication has the added advantage that a construction dispute arising during an insolvency will be more amenable to resolution by a professional construction expert than by many liquidators.

[62] In many cases, disputed cross-claims needing to be resolved as a prelude to a final arithmetical set-off account will both, or all, arise under the same construction contract, as in the present case, because all the mutual dealings between the parties will have arisen under the aegis of that single contract. Even if they arise under more than one construction contract, the adjudicator will be better placed than most liquidators to resolve them. The Scheme contains provision whereby that may be achieved by consent, and the need to take cross-claims into account as defences (by way of set-off) may well mean that there is in reality one single dispute within Akenhead J's helpful rule of thumb in the *Witney Town Council* case.

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

[64] Thus it is no answer to the utility (rather than futility) of construction adjudication in the context of insolvency set-off to say that the adjudicator's decision is unlikely to be summarily enforceable. The reasons why summary enforcement will frequently be unavailable are set out in detail in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2001] 1 All ER (Comm) 1041, paras 29-35 per Chadwick LJ. As he says,

the court is well-placed to deal with those difficulties at the summary judgment stage, simply by refusing it in an appropriate case as a matter of discretion, or by granting it, but with a stay of execution. There is in those circumstances no need for an injunction, still less a need to prevent the adjudication from running its speedy course, as a potentially useful means of ADR in its own right.

[65] Furthermore it will not be in every case that summary enforcement will be inappropriate. There may be no dispute about the cross-claim, and the claim may be found to exist in a larger amount, so that there is no reason not to give summary judgment for the company for the balance in its favour. Or the disputed cross-claim may be found to be of no substance. Or, if the cross-claim can be determined by the adjudicator, because the claim and cross-claim form part of the same "dispute" under the contract, the adjudicator may be able to determine the net balance. If that is in favour of the company, there is again no reason arising merely from the existence of cross-claims why it should not be summarily enforced.

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

[67]. The proper answer to all these issues about enforcement is that they can be dealt with, as Chadwick LJ suggested, at the enforcement stage, if there is one. In many cases the liquidator will not seek to enforce the adjudicator's decision summarily. In others the liquidator may offer appropriate undertakings, such as to ring-fence any enforcement proceeds: see the discussion of undertakings in the *Meadowside* case. Where there remains a real risk that the summary enforcement of an adjudication decision will deprive the respondent of its right to have recourse to the company's claim as security (pro tanto) for its cross-claim, then the court will be astute to refuse summary judgment".
(emphasis added)

44. The rationale of the passages above is that the difficulties identified by the Court of Appeal in ***Bouygues*** concerning potential repayment to the paying party, on final resolution of the dispute that had been adjudicated upon, remain real difficulties. The first point that has to be addressed is whether, by "cross-claim", Lord Briggs meant to include a claim by the defendant for final resolution of the dispute decided in the adjudication decision. I consider that he must, for three reasons. Firstly, there is nothing in the Supreme Court decision that seeks to elevate the status of adjudication decision to one of final resolution of the underlying dispute. Secondly, his reference to ring-fencing of enforcement proceeds, and potential undertakings by the liquidators, has relevance given the paying party's legal right to have the underlying dispute resolved with finality. That right is something established by statute, namely section 108(3) of the Housing Grants, Construction and Regeneration Act 1996 itself, which states that "the contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if

the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement".

45. Thirdly, this is plainly recognised by Lord Briggs because he referred at [13] (in the passage quoted at [2] above) to "de facto final resolution" of disputes. The reason that the resolution is de facto, and not de jure, is precisely because the adjudicator's decision is *not* a final one.

46. The court is not concerned, on enforcement, with whether an adjudicator's decision is right or wrong. The precise facts of a case such as ***Bouygues*** itself are illuminating in this respect. In that case the adjudicator had performed the arithmetic calculation consequent upon his findings incorrectly. By failing to deal with the 5% retention figure correctly in his calculation, the adjudicator had awarded the sum of £208,000 to be paid by Bouygues to Dahl Jensen. Had the calculation been done correctly, a sum of £141,000 would have been payable to Bouygues from Dahl Jensen. This error was clear on the face of the decision itself. This is clear from [9] to [11] of the judgment of Chadwick LJ.

47. Although this is a clear error of fact, namely an ability to perform the necessary calculation, this error did not matter, nor did it render the decision non-enforceable for that reason. As Chadwick LJ stated at [3], quoting from ***Macob v Morrison*** [1999] EWHC Tech 254:

> "But Parliament has not abolished arbitration and litigation construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."

48. JDC effectively submitted before me that the passages of Chadwick LJ identifying the problems of insolvency set-off were dealing with "latent cross claims", from the use by Chadwick LJ of that phrase in [35]. The relevant passage is as follows:

> "[35]….In circumstances such as the present, where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in the liquidation, in which full account can be taken and a balance struck. That is what rule 4.90 of the Insolvency Rules 1986 requires."

49. JDC went on to submit that: "in a case where all that the defendant to the enforcement has is a "latent cross claim", that is to say all claims and cross-claims have been subsumed into the Adjudicator's Decision and all that Defendant has is a claim for repayment of the Adjudicator's Decision (which was discussed in ***Aspect Contracts (Asbestos) Limited v Higgins Construction Plc*** [2015] UKSC 38 as being a claim under an implied term or restitutionary claim), then the Supreme Court in *Bresco* would say there is no conceptual difficulty with that sum being enforced".

50. This analysis ignores Lord Briggs further explanation at [67], and also ignores that the claim by Erith for final resolution of the dispute also amounts to a cross-claim. It seeks to equate the status of the adjudicator's decision – at an "intervening provisional

stage", to use Chadwick LJ's expression - with final resolution of the dispute. It also wholly ignores the effect of section 108 itself.

51. By referring to adjudicators' decisions as constituting de facto final resolution, Lord Briggs was referring to its legal status as being at the intervening provisional stage, that in many circumstances is treated by the parties as the final stage, including when such proceedings are advanced by a liquidator. The reason that the "issues about enforcement", to which Lord Briggs refers at [67], must be grappled with by the court at the enforcement stage, is precisely because it is de facto resolution, and not final determination of the dispute. This is because, otherwise, the company in liquidation would obtain summary judgment, and the money paid to it would not be subsequently available (due to the liquidation) to be repaid, should it turn out that the adjudicator was wrong when final determination of the dispute occurs. A different way of framing the same point would be to consider, if final determination of the dispute were sought by Erith and the judgment was in its favour, who would repay Erith the £1.2 million awarded by the adjudicator?

52. Lord Briggs identified that these issues are to be approached in the following way. Firstly, the liquidator may not seek to enforce the decision by way of summary judgment, and rather simply apply the conclusion of the adjudicator as part of the exercise that he or she is required to undertake in the liquidation. If that were to happen, then by definition there would be no application for summary judgment so further consideration by the court will not arise. Secondly, if summary judgment were to be pursued, these difficulties will be taken into account by the court when considering whether to grant summary judgment and/or a stay. The liquidators may offer appropriate undertakings, such as the ring-fencing of proceeds recovered on enforcement, and these measures will be taken into account by the court. They will be taken into account because they avoid the potential injustice in the sum not being available to be repaid in the event the adjudicator is found to be wrong on final determination of the dispute. The availability of such measures must therefore be material considerations on enforcement. Thirdly, if there is a real risk that the summary enforcement of an adjudication decision will deprive the paying party of security for its cross-claim, then the court would not ordinarily grant summary judgment.

53. I do not consider that the Supreme Court in ***Bresco v Lonsdale*** has found that the difficulties identified both by Chadwick LJ and Coulson LJ do not exist, or are not to be taken into account by the court at the enforcement stage. Rather to the contrary, Lord Briggs has reinforced that these difficulties where a company is in liquidation are to be considered by the court, but only at the enforcement stage, and not earlier than that (which is how the judgments in ***Bresco*** at first instance and in the Court of Appeal had dealt with them, granting an injunction to prevent the adjudication occurring at all). That is what Lord Briggs has expressly stated in the Supreme Court decision in ***Bresco*** both at [64] (which I have quoted at [31](10) above) and also at [67]. What ***Bresco*** has decided is that that these potential difficulties are to be considered upon enforcement; that there is real value to companies in liquidation to have adjudication available (as this may even resolve the underlying dispute with finality in many situations); and that companies in liquidation are to be permitted to adjudicate upon such disputes. Some liquidators may not even seek to enforce adjudication decisions in court proceedings, and one example that comes to mind in

this category is the issue of which party has repudiated a construction contract. This is a very good example of a dispute which an adjudicator could resolve, with the answer governing the whole approach of the liquidator and other contracting party to valuation of sums due, and which contractual payment provisions are engaged.

54. I consider that the principles to be applied by the court when considering an application for summary judgment on an adjudication decision in favour of a company in liquidation (given Lord Briggs' dicta in ***Bresco***, and his approval of Chadwick LJ in ***Bouygues***) are as follows:

1. Whether the dispute in respect of which the adjudicator has issued a decision is one in respect of the whole of the parties' financial dealings under the construction contract in question, or simply one element of it.

2. Whether there are mutual dealings between the parties that are outside the construction contract under which the adjudicator has resolved the particular dispute.

3. Whether there are other defences available to the defendant that were not deployed in the adjudication.

4. Whether the liquidator is prepared to offer appropriate undertakings, such as ring-fencing the enforcement proceeds, and/or where there is other security available.

5. Whether there is a real risk that the summary enforcement of an adjudication decision will deprive the paying party of security for its cross-claim.

55. To expand upon the above points, the principle at (1) is necessary as the courts have some experience of parties referring a very small, or tightly defined, dispute to adjudication for tactical reasons, leaving other disputes under the construction contract outwith that adjudication. Although this might be beneficial to that party in some circumstances, in my judgment if the referring party is in liquidation, it will not assist that party on enforcement. Whether the original intention of the legislators or not, the type of overly-technical dispute concerned with services of notices within particular number of days that are called "smash and grab" adjudications would rarely if ever, in my judgment, be susceptible to enforcement by way of summary judgment by a company in liquidation.

56. The principles at (2) and (3) may be different ways of expressing the same proposition. They both come from [63] of ***Bresco*** per Lord Briggs, where he identified examples as being "apportionment of liability for personal injuries, or liability under mutual dealings between the same parties in some other commercial field". This part of the Supreme Court decision makes it clear that it is dealing with a situation other than the type considered by the Court of Appeal in ***Ferson Contractors Ltd v Levolux AT Ltd*** [2003] EWCA Civ 11. The ratio of that decision is described at 9.31 of Coulson on Construction Adjudication, Oxford University Press, 4th Ed (2018) as follows:
"It is suggested that *Levolux* provides clear guidance as to the position when a party seeks to set off against an adjudicator's decision. In general terms, the courts will view such an argument as an attempt to frustrate the 1996 Act and, in the ordinary case, will not therefore permit it. This is particularly so where, as in *Levolux*, the

subject matter of the purported set off had implicitly been dealt with in the adjudicator's decision."
(emphasis added)

57. When one considers that enforcement by a company in liquidation is a claim which, by its nature, is subject to insolvency set off, it can be seen that this is not "the ordinary case" in any event, to adopt the phrase from 9.31 of the leading textbook above. In that situation, the Supreme Court in ***Bresco*** can be seen as consistent with ***Levolux*** (or at the least, not inconsistent with it) and I consider that it is consistent. In my judgment, ***Levolux*** remains applicable for parties not in liquidation.

58. Similarly, those at (4) and (5) in [54] may also be different ways of expressing the same principle as one another. These both come from [67] of ***Bresco***, also quoted above. Alternatively, the offering of undertakings by the liquidator could be seen as one way of dealing with the real risk that, otherwise, the grant of summary judgment would deprive the paying party of security for its cross-claim. In ***Meadowside*** at [87](3)(a) to (c) there are three mechanisms of security considered. These are undertakings by the liquidators; a third party providing a guarantee or bond; and ATE insurance. These three should not be seen as an exhaustive list, but certainly these are the three main ways in which security could be provided in such a situation.

59. CPR Part 24 states as follows:
"24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
(a) it considers that –
(i) that claimant has no real prospect of succeeding on the claim or issue; or
(ii) that defendant has no real prospect of successfully defending the claim or issue; and
(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

60. I consider that the principles at (1) to (5) at [54] above all arise when the court is considering both whether the defendant would have a real prospect of successfully defending the claim, and whether there is a compelling reason why the case should be disposed of at trial. They therefore plainly arise to be considered on an application for summary judgment.

61. At [46] Lord Briggs said the following, in terms of the adjudicator determining a single dispute, having considered [38] in the judgment of Akenhead J in ***Witney Town Council v Beam Construction (Cheltenham) Ltd*** [2011] EWHC 2332 (TCC):
"Applying Akenhead J's useful rule of thumb, it appears that a dispute about a cross-claim relied on as a set-off by way of defence to the claim referred will be part of the dispute raised by the reference, because the claim cannot be decided without consideration of the cross-claim by way of defence".

62. I therefore conclude that the circumstances where summary judgment would be available to a company in liquidation who seeks to enforce an adjudicator's award in its favour are as follows:
1. The decision of the adjudicator would have to resolve (or take into account) all the different elements of the overall financial dispute between the parties to the

construction contract. Where, as here, the dispute referred was the valuation of the referring party's final account, summary judgment will potentially be available (dependent upon the other considerations below). If the dispute referred is a more narrowly defined one, such as the valuation of a single component part of an interim payment, or one single head of claim, then it will not.
2. Mutual dealings on other contracts, or other defences, if they have not been taken into account by the adjudicator, will be taken into account by the court on the summary judgment application. I draw this conclusion from what Lord Briggs says at [65], where he stated "there may be no dispute about the cross-claim, and the claim may be found to exist in a larger amount, so that there is no reason not to give summary judgment for the company for the balance in its favour."
3. There is no "real risk" that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim.

63. The type of adjudication envisaged at [62](1) where all the different elements of the overall financial dispute between the parties are referred to the adjudicator is not entirely usual. I would suggest that they are unusual. In ***Indigo Projects London Limited v Razin*** [2019] EWHC 1205 (TCC), Sir Antony Edwards-Stuart sitting as a High Court Judge stated that this type of adjudication was "fairly rare". At [49] in ***Meadowside v Hill Street Management***, the judge in that case said "the type of adjudication which seeks a determination of the entirety of the account is atypical". It is somewhat at the opposite end of the scale to more technical "knock out" type adjudications, and what are sometimes called "smash and grab" adjudications. Whether the court will see an increase in the type of adjudications described at [62](1) by companies in liquidation following the Supreme Court decision in ***Bresco*** is yet to be seen.

64. The point at [62](2) does have a practical consequence for adjudicators, who may find themselves asked by responding parties to become embroiled in matters outside the construction contract, and even potentially outside their expertise. Orthodoxy would suggest that they ought to resist becoming involved in this way. They are appointed to resolve the dispute under the construction contract. Absent specific agreement from the parties for the adjudicator also to consider and resolve matters outside the construction contract, they would have no jurisdiction to do so. Such matters would be a matter for the court on the summary judgment application.

***Issue 2 Are those circumstances present here, such that JDC is entitled to summary judgment?***

65. Although some of the same considerations arise under both this and Issue 3 concerning the imposition of a stay, I consider that each issue has to be addressed sequentially. This is because Lord Briggs at [67] in ***Bresco*** expressly states that where there is a real risk that the summary enforcement of an adjudication decision would deprive the paying party of its right to have recourse to that claim as security for its cross-claim, then the court would refuse summary judgment. Although addressing that point covers much of the same ground that would need to be addressed when deciding whether a stay of execution would be ordered, the imposition of a stay would only arise if a claimant succeeded in obtaining summary judgment.

66. In the instant case, Erith relied upon an amount claimed to be due to it from JDC of £40,000 on another contract, called the Tooley Street works which were performed at the Tooley Street fire station, as a (partial) defence to the claim brought against it in the adjudication relating to works at the Olympic Park. This is because Erith contended that, by agreement, JDC and Erith had agreed that it would be deducted from JDC's account for the Olympic Park works. This claim was expressly considered, and dismissed on evidential grounds, by the adjudicator between paragraphs 931 and 968 of his decision. Accordingly, there is no need for the court to consider that separate head of claim by Erith on the summary judgment application. It has been taken into account, at least for the purposes of the resolution of the dispute under the Olympic Park landscaping works sub-contract, in the adjudication decision.

67. Applying each of the points at [62](1) and (2) to the factual circumstances here, the dispute referred to the adjudicator was one for JDC's final account. In other words, the overall balance claimed to be due by JDC for its works on the subcontract was the subject matter of the adjudicator's decision, taking into account the Tooley Street works. Both of these points are in JDC's favour on the application.

68. However, even if I am wrong in my conclusion about that, and even if the whole of the amount of £40,000 claimed on the Tooley Street works were to be allowed in Erith's favour on this application, that would still leave a substantial amount on the claim sought by way of summary judgment. The existence of that claim alone would not defeat the application for summary judgment.

69. In other words, the mere fact that a responding party has a claim on another contract, or arising under other mutual dealings, against the party seeking to enforce its adjudication decision, is not itself sufficient to defeat an application for summary judgment. It would depend both on the size of the claim, and indeed the type of claim. It is not entirely fanciful to consider a situation where a defendant in the same position as Erith is here, may even have earlier adjudicator's decisions in its favour on other contracts, but which have not been satisfied (not least because the subsequent referring party is insolvent and so has gone into liquidation). Or, as in the case of ***Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd*** [2009] EWHC 3222 (TCC), there might be a number of different contracts, with different sums said to be due in different directions on each.

70. The mere existence of some cross-claims, which might be (as with the Tooley Street works claim, had it not been deployed in the adjudication) of relatively insignificant value, does not of itself mean that a claimant ought to be denied summary judgment.

71. I move therefore to the point at [62](3), and whether there is a real risk that the summary enforcement of an adjudication decision would deprive the paying party of its right to have recourse to that claim as security for its cross-claim. That becomes the real battleground on this application. Indeed, Erith sought to have me deal with this point first, because it was submitted its case on this was so strong that it would avoid the need to consider the other points.

72. JDC sought to rely upon two separate mechanisms in order to demonstrate that this main issue should be resolved in its favour on the application. These were what was

said to be a draft letter of credit from Henderson Jones' bankers; and an After The Event (or "ATE") insurance policy.

73. Before turning to these matters that arise on the particular facts of the instant case, however, I will consider the origin of such attempts by an insolvent company to put itself in the position whereby it can achieve success in obtaining summary judgment, when seeking to enforce an adjudicator's decision in its favour. This is the same decision that may have led to the execution of the Deed of Agreement in this case with Henderson Jones.

***The decision in Meadowside v Hill Street Management***

74. Lord Briggs at [67] of ***Bresco*** made reference to this decision, and in particular the discussion in that judgment concerning undertakings. He also referred to it regarding another point at [14].

75. As made clear in the chronology at [31] above, on 1 January 2019 the Court of Appeal handed down its judgment in ***Bresco v Lonsdale*** [2019] EWCA Civ 27. This considered the utility of permitting a company in insolvent liquidation to adjudicate upon a dispute, as has been seen. Later the same year, and following on from that decision, on 10 October 2019 judgment at first instance was handed down in ***Meadowside v Hill Street Management*** [2019] EWHC 2651 (TCC). Mr Recorder Constable QC considered an application for summary judgment on an adjudicator's decision by a company in insolvent liquidation. In both ***Bresco*** and ***Meadowside***, there was the same third party involved on behalf of the insolvent company, in a similar position to the one which Henderson Jones occupies in this case. In that case, as made clear at [10] of the judgment, the liquidators had appointed a company called Pythagoras Capital Ltd ("Pythagoras") to pursue the debt considered to be owed to Meadowside. Pythagoras had also been involved in the ***Bresco*** case.

76. The judgment in ***Meadowside*** explains the involvement of Pythagoras in the following way.

> "[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."

77. The discussion of undertakings appears at [55] and [56] of the judgment. This is in the context of the principal sum of an adjudicator's decision, which the responding party may wish to recover by means of final resolution of the dispute. The judgment states:

"[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 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'."

78. At [51] in ***Bresco*** in the Court of Appeal**,** which I consider still to be persuasive on this specific point (even if not strictly binding, given the Supreme Court overturned the decision) Coulson LJ stated the following, when dealing with the consequences of enforcing by way of summary judgment an adjudication decision in favour of an insolvent company.
"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. <u>The obvious risks would be that any recovery may be rendered difficult or impossible by the liquidation</u>, 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."
(emphasis added)

79. This also touches upon another obstacle to a responding party seeking to recover a sum ordered to be paid to an insolvent company, namely the costs burden of doing so. This was not particularly highlighted by Lord Briggs in ***Bresco***, but is one of the points bitterly debated by the parties in the instant case before me. The point was considered in ***Meadowside*** in the following terms, where the judgment, having quoted the passage above from [51] in ***Bresco*** in the Court of Appeal, states:

"[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".

80. I consider the primary concern, when the court comes to consider whether there is a real risk that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim, to be recovery of the sum paid by way of satisfying the adjudicator's decision. A secondary concern is the costs that would be expended in doing so. At [68] and [69] in the Supreme Court in ***Bresco***, Lord Briggs considered the costs burden, but did so predominantly in the context of a party's costs in an adjudication, and the costs of the adjudicator, rather than focusing on the costs that would be incurred in (on this analysis, successfully) litigating or arbitrating to achieve final resolution of the dispute. This can be seen as costs that would be expended on winning the money back. Lord Briggs' only comment in respect of those litigation or arbitration costs was the following:
"Similarly it is inherent in the adjudication procedure that a party may be put to expense in having an incorrect decision put right in later litigation (or arbitration), at least part of which will usually be irrecoverable even if the litigation succeeds."

81. It is for that reason that I categorise this as a secondary, rather than a primary, concern. Further and in any event, JDC relies upon the fact that the costs of the enforcement and the costs of defending any substantive proceedings are also post-insolvency expenses. Insolvency Rule 6.42 sets out the order of priority of payments in a Creditors Voluntary Liquidation (which is the regime that applied in the present case). It has equivalent effect to Insolvency Rule 7.108, which applies in the context of a winding up, which was the applicable regime in ***Bresco***. Rule 6.42 states:

> *6.42.—(1) All fees, costs, charges and other expenses incurred in the course of the winding up are to be treated as expenses of the winding up.*
> *(2) The expenses of the winding up are payable out of—*
> *(a) assets of the company available for the payment of general creditors, including—*
> > *(i) proceeds of any legal action which the liquidator has power to bring in the liquidator's own name or in the name of the company,*
> > *(ii) proceeds arising from any award made under any arbitration or other dispute resolution procedure which the liquidator has power to bring in the liquidator's own name or in the name of the company,*
> > *(iii) any payments made under any compromise or other agreement intended to avoid legal action or recourse to arbitration or to any other dispute resolution procedure, and*
> > *(iv) payments made as a result of an assignment or a settlement of any such action, arbitration or other dispute resolution procedure in lieu of or before any judgment being given or award being made; and*
>
> ...

*(3) The expenses associated with the prescribed part must be paid out of the prescribed part.*

*(4) Subject as provided in rules 6.44 to 6.48, the expenses are payable in the following order of priority—*

*(a) expenses which are properly chargeable or incurred by the liquidator in preserving, realising or getting in any of the assets of the company or otherwise in the preparation, conduct or assignment of any legal proceedings, arbitration or other dispute resolution procedures, which the liquidator has power to bring in the liquidator's own name or bring or defend in the name of the company or in the preparation or conduct of any negotiations intended to lead or leading to a settlement or compromise of any legal action or dispute to which the proceedings or procedures relate;*

82. JDC relies upon this rule to demonstrate that if there is litigation and the company is made liable for the defendant's costs, then in the absence of any other source of funding (such as an ATE policy or other third party funding), those costs would have to be met by JDC, even if that is at the expense of the liquidator's remuneration. In other words, under Rule 6.42, an order for adverse costs against JDC will take priority over any of the costs and expenses of the liquidation. This means that a party in possession of a costs order against an insolvent litigant is entitled to look not only to be paid out the costs in hand in the liquidation but also to the repayment of any funds spent (e.g. monies spent in paying remuneration to the office-holders). Authority is relied upon by JDC to support this proposition, namely ***Re Movitex Ltd*** [1990] B.C.C. 491; ***Re MT Realisations Ltd*** [2003] EWHC 2895 (Ch); and ***RBG Resources plc v Rastogi*** [2005] EWHC 994 (Ch). All of these were submitted after the hearing as part of post-hearing submissions, therefore no oral argument was heard on this. However, all these cases concern a case where it is the liquidator who has brought the proceedings, not a party in the position that Erith would occupy. JDC contend that the same result would occur if Erith were the claimant and the company in liquidation the unsuccessful defendant.

83. Even if JDC is right – and I do not consider it necessary to resolve the point in any event, and I have only been provided with submissions in writing for one party, JDC – and costs incurred by Erith as claimant in subsequent proceedings would be payable by JDC, even at the expense of the liquidator's fees, this does not assist JDC for the following two reasons. Firstly, JDC is proffering an ATE policy in this case as sufficient security for an adverse costs order in Erith's favour. The sufficiency of the ATE policy must therefore be considered. Secondly, one does not even come to consider whether concerns about costs orders are well founded, or not, unless there is s sufficient security in respect of the principal sum the subject of the adjudicator's decision. The two concerns the court will have on enforcement of an adjudicator's decision when a company is in liquidation are, in order of priority, as follows. Firstly, potential repayment of the sum that would be actually paid out to JDC on summary judgment for enforcement of the adjudicator's decision. Secondly, potential recovery of any costs, not yet expended, that would be incurred in seeking that recovery, although this point is subject to JDC's arguments based on Rule 6.42.

84. Both of these concerns can, in theory at least, be met by appropriate safeguards. However, it is recovery of the sum that would actually be paid out to the company in liquidation, were summary judgment to be granted, that is of the most importance, in my judgment.

85. Finally, in the ***Meadowside*** case, at [84] it was stated that "as near as possible, the safeguards must seek to place the responding party in a similar position to if the company was solvent". I agree with that, and I adopt that approach. This is the obverse of Lord Briggs reference to "real risk" at [67] of Bresco in the Supreme Court. I consider that whatever safeguards are offered by the company in liquidation, they must seek to place the responding party in such a position. The ethos of adjudication is "pay now, argue later". The purpose of the "argue later" element of that phrase, which is contained in section 108 of the 1996 Act, is that the "pay now" element can be rewound, if the court or an arbitrator considers the outcome of the dispute is in the responding party's favour. Further, the court or arbitrator is not concerned with an appeal-type approach or review of the adjudicator's decision. They resolve the dispute *de novo*.

***The mechanisms of security offered in the instant case***

86. The starting point in the instant case is that no undertakings at all are offered from the liquidators. These were envisaged, at least in general terms, by Lord Briggs in ***Bresco*** at [67] when he said "in others the liquidator may offer appropriate undertakings, such as to ring-fence any enforcement proceeds." No such ring-fencing by the liquidators is available in this case. No security is offered by the liquidators in any respect.

87. However, JDC relies upon what it maintains is adequate security, not from the liquidators but from Henderson Jones. The skeleton argument for JDC states the following:

> "For the reasons set out below, it is the Claimant's case that it has put arrangements in place that would allow it to bring itself within the exception to the general rule against enforcement, identified in ***Meadowside v 12-18 Hill Street Management Company Ltd*** [2019] EWHC 2651 ("Meadowside"). It is offering security through Henderson & Jones (H&J) on the basis detailed below. It is submitted that the security offered is adequate to meet the legitimate concerns of the Court of Appeal in ***Bresco*** and to provide, what the Supreme Court in ***Bresco*** described as, reasonable assurances to the Defendant that, should it successfully overturn the Adjudicator's Decision in later proceedings, the Claimant will be able to (i) repay the capital sum and (ii) meet any adverse costs orders."
> (emphasis added)

88. This passage in the skeleton argument sensibly accepts that the concerns of the Court of Appeal in ***Bresco*** are legitimate. The security available or proffered is said to be by way of letter of credit, and an ATE insurance policy. The former is to deal with recovery of the sum claimed under the substantive decision of the adjudicator; the latter is to deal with costs exposure in subsequent litigation.

89. Because the security is offered through Henderson Jones, and not from the liquidators, it is necessary to consider the position of that firm a little further. This is a highly contentious subject between the parties. In its skeleton argument, Erith refers to this

as "trafficked litigation". This is an unfortunate expression, although it is used in different authorities, including the leading House of Lords case on champerty ***Trendtex Trading Corporation v Credit Suisse*** [1982] AC 679 by Lord Wilberforce at 694, where he said:

"The vice, if any, of the agreement lies in the introduction of the third party. It appears from the face of the agreement not as an obligation, but as a contemplated possibility, that the cause of action against C.B.N. might be sold by Credit Suisse to a third party, for a sum of U.S. $800,000. This manifestly involved the possibility, and indeed the likelihood, of a profit being made, either by the third party or possibly also by Credit Suisse, out of the cause of action. In my opinion this manifestly "savours of champerty," since it involves trafficking in litigation - a type of transaction which, under English law, is contrary to public policy. I take the definition of "champerty" (etymologically derived from "campi partitio") from Halsbury's Laws of England, 4th ed., vol. 9 (1974) para. 400:
"Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action."
(emphasis added)

However, the use of some phrases and words is rather different now than nearly 40 years ago. Given the evil of trafficking in persons, in my judgment trafficking in litigation is an expression which ought now to be avoided. Umbrage is taken by Mr Henderson in some of his later evidence at what he considers to be imputations on his firm's professionalism, and he explains that all the members of the firm are qualified solicitors and/or chartered accountants and have high business standards.

90. The skeleton argument for JDC describes Henderson Jones as "funders in the broad sense" and also states that they "fund litigation by purchasing it". I accept the former proposition; I do not accept the latter as a wholly accurate description. Neither the adjudication proceedings, nor this litigation, is funded by Henderson Jones having "purchased it". What Henderson Jones have purchased is a right to the proceeds of the recovery by way of adjudication of the final account dispute, those proceeds depending upon whether that decision is enforced by the courts. The purchase price, which as has been seen was £6,500 paid to the liquidators (who will also potentially recover later 45% of the proceeds), is not being used by the liquidators to fund either the adjudication, or this litigation. The sums paid by Henderson Jones are not therefore "funding the litigation by purchasing it", which suggests the purchase price is used to pay for the litigation. Henderson Jones are purchasing the right, and then funding the litigation to maximise recovery or the value of that right. They could litigate for a final determination of the value of the right, but would rather adjudicate.

91. Different firms of solicitors have acted for JDC and/or Henderson Jones in the adjudication and then the enforcement proceedings. Erith relies upon a number of solicitors' letters passing to and from Henderson Jones, many of which are heavily redacted, to justify its claims that Henderson Jones has entered into agreements with JDC that are Damages Based Agreement under s.58AA of the Courts and Legal Services Act 1990, and that Henderson Jones is providing "advice or other services in relation to the making of a claim" under section 419 of the Financial Services and Markets Act 1990.

92. JDC maintains that Henderson Jones is *not* providing advice and other services in relation to the claim. Some reliance is placed by JDC on the terms of the Deeds of Assignment and Agreement that recite that the parties have agreed that Henderson Jones is not doing so. However, JDC's submissions are difficult to take at face value given Henderson Jones' involvement to date, shown both on the documents and in the three witness statements from Mr Henderson. Henderson Jones has procured the ATE Cover and Letter of Intent. In my judgment, Henderson Jones has occupied a more or less central position in these proceedings. Clauses in the Deeds of Assignment and Agreement headed "Status of Relationship" are carefully worded to state what Henderson Jones is *not* doing. However, just because the parties choose to include such a description does not mean that description is binding upon the court, or is an accurate description. Further, if the description were to be correct, it is difficult to see the basis for any redactions in any of the letters passing between Henderson Jones and JDC's solicitors.

93. Erith rely, inter alia, upon the fact that, as put in its skeleton argument, "the very vehicle for the Letter of Intent is H&J's account with Lloyd's". Erith rely upon the agreements that JDC and the liquidators have entered into with Henderson Jones which provide for Henderson Jones to retain at least 55% of the sums recovered including any costs recovery from the Defendant. This will be more than 50% of the sums ultimately recovered by JDC, the Claimant, and so prima facie they would contravene Regulation 4 of the 2013 Regulations which govern damages based agreements, and hence be unenforceable. They also do not provide the reason for setting the amount of payment at the level agreed, which again on the face of it, would make them not compliant with Regulation 3 (c) of the 2013 Regulations which requires that to be done. However, although a late attempt was made by JDC (not through evidence, but by way of a document produced setting out different financial calculations) to demonstrate why the percentage recovery by Henderson Jones would in reality be less than that prohibited by the 2013 Regulations, the obvious starting point is the figure in the Deed of Assignment, and that figure is somewhat stark. It plainly grants Henderson Jones 55%. On any sensible analysis, in my judgment, that is in excess of "50% of the sums ultimately recovered by the client" and is thereby prohibited by the Regulations. The effect of that may be that the agreement entered into between the liquidator and Henderson Jones is unenforceable.

94. However, and in any event, there is no need to lengthen this judgment unduly with fact specific analysis of the precise legal mechanics of Henderson Jones' position. At this stage in the analysis, it is the quality of the security that is of central importance. If it is not sufficient, then whether the agreement between Henderson Jones and the liquidator is, or is not, contrary to the 2013 Regulations, and what the consequences might be, do not even arise.

95. What precisely Henderson Jones has done following the execution of the Deed of Assignment would be potentially relevant due to the diverse range of arguments mounted by Erith, including abuse of process, breaches of the 2013 Regulations that I have identified, and champerty (which is also alleged by Erith). However, one would only reach that varied and rich legal landscape if the other relevant matters, in particular the security available, were such that the court were otherwise persuaded that this was sufficient to meet the risk present in ordering payment of the sum the subject of the adjudicator's decision to a company in liquidation.

96. In my judgment, there is plainly no letter of credit available. None has been produced and it is common ground that one does not exist. A letter of credit is a financial instrument, with similar characteristics to some types of bond, and has a particular status and value. What is proffered is a so-called letter of *intent* from Henderson Jones' bankers. Three different versions of it are available, as it has been refined on two occasions as the hearing approached.

97. Miss White for JDC seeks to have this letter of intent equated to a letter of credit because, although no application has yet been made by Henderson Jones for a letter of credit, she states that the letter of intent contains a promise by the bank irrevocably to issue one, upon an application being made by Henderson Jones. In my judgment, it should be noted that this is not an application that would be made by the liquidators on behalf of JDC the company. Mr Henderson has offered an undertaking to the court to make an application for a letter of credit, as soon as the judgment sum (namely the amount sought, £1.2 million) is paid into Henderson Jones' bank account. This means that unless and until Henderson Jones actually receive the whole of the sum sought by way of summary judgment, there is no security available at all, and the application will not even be made until the whole sum were paid to Henderson Jones.

98. The terms of the letter state as follows:
"We, Lloyds Bank PLC ("Lloyds"), irrevocably agree to issue a letter of credit in the form attached as Schedule 1 to this letter (the "Letter of Credit") in the event that:
1. The Court grants enforcement of the decision of Peter Aeberli in his capacity as Adjudicator dated 15 June 2018 (as corrected by the Adjudicator on 29 June 2018) in favour of John Doyle in the sum of £1,216,178.61 (or at whatever other amount the court deems appropriate) plus interest;
2. the amount awarded by the Court (the "Decision Amount") has been paid by Erith to the Applicant [Henderson Jones];
3. the Applicant has submitted a letter of credit application form to Lloyds in the bank's standard form; and
4. the Decision Amount has been paid into the Applicant's account with Lloyds."

99. The court is therefore faced, not with considering the terms of a letter of credit itself, but considering a potential application for one, that application not yet having been made. There are substantial difficulties with this. Firstly, the Lloyds Bank letter requires the whole judgment sum to be paid to Henderson Jones. At least (or about) 45% of that belongs to the liquidator. Secondly, Lloyds Bank must have detailed terms and conditions for the grant of letters of credit. It is implicit within this letter that Henderson Jones must satisfy these terms and conditions. Thirdly, the court has no knowledge of any other terms between Henderson Jones and Lloyds, or Henderson Jones' other banking arrangements with Lloyds, and how these may impact upon any credit advanced by way of the letter of credit. Fourthly, the letter of intent was amended prior to the hearing and the latter, amended letter had no letter of credit appended to it in any event. Fifthly, in my judgment this is a wholly circular arrangement. Erith objects to making payment to JDC because it says there is no security available; JDC effectively accepts that no security is available from it or its liquidators, but says Henderson Jones will provide it; Henderson Jones says it will only provide it if Erith pays over the money, and even then all Henderson Jones can do is promise to apply for it. That is not exactly reassuring, and in my judgment it is a

strange way to offer security. It does not represent the proffering of security; it represents an offer by another entity (Henderson Jones) to seek to obtain security, which is rather different.

100. Finally and sixthly, payment of the principal sum in full to Henderson Jones in order to satisfy the requirements of the letter of intent is contrary to the terms of the ATE policy, considered further below. At clause 4.1 this expressly requires JDC's solicitors to "hold all sums recovered from the Other Side subject to a lien for the Insured's liability to the Insurer for the Premium or the proportion payable to the Insured in accordance with clause 7.2 below." This is nowhere addressed in the terms of the letter of intent at all, nor is the existence of such a lien considered in the documents from Lloyds Bank. That clause is likely to be contrary, in my judgment, to the grant of a letter of credit. I do not see how JDC's solicitors can comply with such an express term, yet the whole sum also be paid to Henderson Jones, something expressly required by the letter from Lloyds Bank.

101. In my judgment, these arrangements, and an intention to apply for security by advancing a letter of intent (rather than, at the least, proffering security itself in terms of a letter of credit or similar financial instrument) cannot be equated to a safeguard that seeks to place Erith in a similar position to the one which it would be in were JDC to be solvent.

102. I do not consider the proposed arrangement to be sufficient, nor do I consider it comparable to undertakings from the liquidators which Lord Briggs plainly had in mind, nor do I consider it similar to ringfencing the proceeds. Further, it would only arise after the money had been actually paid to and received by Henderson Jones, who are not a party to the proceedings (such payment being in breach of the terms of the ATE policy). Any judgment on this enforcement would be in the name of the company, JDC, and payment ordered by the court in satisfaction of such a judgment one would ordinarily expect to be made to JDC. Although the point was barely addressed before me, in the ordinary course of things that judgment sum would be paid to the company JDC, and thereby form part of the fund available to be distributed to *all* of JDC's creditors by the liquidators, not solely to Henderson Jones. However, given my view of the letter of intent as insufficient, further consideration of that is not required.

103. I turn therefore to the security which is said to be available in respect of Erith's costs. This is said to be available by way of an ATE insurance policy, a copy of which is available. The ATE Policy has been obtained by Henderson Jones and is similarly subject to strident criticism by Mr Hussain QC, leading counsel for Erith. Henderson Jones has offered ATE cover from a company called TM Legal. Erith prays in aid the decisions of the courts in security for costs cases, where in order to avoid paying a sum into court, a party otherwise at risk of order providing security seeks to rely upon such a policy. I consider the dicta in such cases to be relevant when considering the situation before the court in the instant case.

104. The leading case is from the Court of Appeal in ***Premier Motorauctions v Price Waterhouse Coopers and Lloyds Bank*** [2017] EWCA Civ 1872. This held that exclusions in an ATE Policy can lead to a realistic prospect that cover under the Policy may be avoided or excluded. In such cases the courts have declined to accept

such ATE cover as adequate security. JDC meets Erith's criticisms of the terms of this cover by explaining, in the evidence of Mr Henderson, that the professionals have acted carefully in obtaining the policy. I am satisfied that they have. However, a similar argument was deployed, unsuccessfully, in ***Premier Motorauctions***. In that case, both the defendants had sought security for costs in very sizeable sums – over £3.5 million each – from a company in liquidation, but Snowden J had refused to make the orders sought, in reliance upon ATE insurance. This decision was overturned on appeal. Longmore LJ at [19] to [24] considered that the question was whether the ATE cover gave "sufficient protection" for the defendants, that term being taken from Sedley LJ in ***Al Koronky v Time-Life Entertainment Group Ltd*** [2006] EWCA Civ 1123.

105. Longmore LJ considered in detail the position of such insurance and its adequacy. One of the criticisms of the insurance made by the defendants, both below and on appeal in that case, was the fact that such insurance cover could be avoided by the insurer. He considered the views of the first-instance judge, who had found that it was "something of a leap" to conclude that disbelief of a witness on the part of a judge would provide grounds for insurers to avoid the policies. This was part of the reasoning of Snowden J who had concluded that ATE cover was sufficient protection for security for costs.

106. Longmore LJ dismissed this in the following terms:

"[27] Again I cannot with respect agree. Of course it does not follow that insurers would avoid but the difficulty is that neither the defendants nor the court has any information with which to judge the likelihood of such avoidance. One knows that ATE insurers do seek to avoid their policies if they consider it right to do so, see ***Persimmon Homes Ltd v Great Lakes Reinsurance*** (UK) Plc [2010] EWHC 1705 (Comm), [2011] Lloyd's Rep IR 101 in which a successful defendant was unable to recover its costs from ATE insurers. The landscape after trial may be very different from the landscape as it appears to be at present and it is unsatisfactory to have to speculate.

[28] The judge felt he could rely on the fact that the proposals to insurers were made by Joint Liquidators who are independent professional insolvency office-holders, and who investigated the claims with the assistance of experienced solicitors and counsel providing a high level of objective professional scrutiny. All this is, of course, true but the best professional advice cannot cater for cases of non-disclosure of matters which the professionals do not know.

[29] Neither the defendants nor the court have been provided with the placing information put before the insurers but, even if that had been provided, it is unlikely that the court could be satisfied that the prospect of avoidance is illusory. Even at the jurisdictional stage of considering security for costs, the defendants must, as Mance LJ said in ***Nasser***, "be entitled to some assurance that [the insurance] was not liable to be avoided for misrepresentation or non-disclosure". I cannot see that on the facts of this case these defendants have that assurance. It follows therefore that there is reason to believe that the Companies will be unable to pay the defendants' costs if ordered to do so and that the jurisdictional requirement of CPR 25.13 is satisfied."
(emphasis added)

107. There are a number of first instance cases applying ***Premier Motorauctions,*** each of which show that the absence of anti-avoidance provisions, and the presence of avoidance clauses, will normally mean that ATE cover which includes such terms is not adequate security. Erith rely upon the very great similarity between some of the exclusions in the ATE policy, and the degree to which these are either exactly the same (with different clause numbers) or said to be wider than those in the ***Premier Motorauctions*** case. For its part JDC seeks to rely upon parts of the judgment of Stuart-Smith J in ***Geophysical Service Centre v Dowell Schlumberger (ME) Inc*** [2013] EWHC 147 (TCC). There are two things wrong with that. Firstly, that case preceded ***Premier Motorauctions***, which is a decision of the Court of Appeal on the same point. Secondly, Longmore LJ made clear that the judge in ***Premier Motorauctions*** had been "particularly impressed by" the remarks in that same case by Stuart-Smith J. He also made it clear that in the policy in ***Geophysical*** the only anti-avoidance provision was for fraud. The policy in ***Premier Motorauctions*** had far wider provisions which could entitle the insurer to avoid cover. In any event, in my judgment ***Geophysical*** is now best considered as a decision confined to its own facts. It must obviously now be read as subject to the Court of Appeal decision in ***Premier Motorauctions***.

108. The ATE Policy in the instant case has a number of material exclusions and avoidance clauses which, in my judgment, support the criticisms made by Erith. Many of them are similar, if not identical, to the terms of the policy held to be insufficient in ***Premier Motorauctions.*** Further, it is in the name of Henderson Jones, and was not obtained or procured by the liquidators. It is Henderson Jones who have made the presentation of risk to the insurers, although both JDC and Henderson Jones are the insured. The restrictions are not solely in respect of fraud. They are numerous and varied. I find that the numerous features in this policy that are similar to the ones in the policy in ***Premier Motorauctions*** mean that the criticisms of Erith concerning this policy are well founded.

109. Clause 3.2 allows total avoidance of the Policy if a material Fair Presentation were not made. In my judgment, some of these exclusions (if not all) have a real prospect of occurring, and mean TM Legal could, at its election, terminate the cover. One exclusion is at clause 2.1.11, namely "The Insured's decision to continue the Dispute after TM Legal has informed the Representative that in their view the Insured is more likely than not to lose the Dispute, without TM Legal's approval." Views on prospects can change very rapidly. This exclusion means that if TM Legal conclude that JDC is likely to lose, and does not approve continuation of the dispute, then the cover can be avoided if the dispute continues. Since the policy is to provide cover for an adverse costs order, there is obvious concern over whether it has any real value if it can be avoided in these circumstances.

110. Reliance is also placed by JDC on what is said to be a "standing offer" to provide a Deed of Indemnity or Bond. However, that "standing offer" is part of the ATE Policy, and is offered by the Insurer, TM Legal, as defined in the policy "to meet a security for costs order" (emphasis added). The dispute defined in the Schedule states "the claim will be brought either by John Doyle Company Ltd (acting by its liquidators) or Henderson & Jones Ltd as assignee (as beneficiary under a trust)". It is not something outside of, or additional to, the ATE Policy, but in any event it would be available if

an action were commenced by JDC and a security for costs order was made against it. JDC might not commence such proceedings; indeed, if this summary judgment application is successful, it is difficult to envisage circumstances in which JDC would choose to do so. The Deed of Indemnity would not, on the face of it, provide security in respect of a costs order made in proceedings commenced by Erith against JDC, which is a rather different scenario, and the more likely way that subsequent proceedings would unfold.

111. JDC submits that this is not a security for costs application, and Miss White submitted that the court is therefore not bound by ***Premier Motorauctions.*** The first point is doubtless correct; the second point, in my judgment, is not. Under the doctrine of *stare decisis*, the High Court is bound by decisions of the Court of Appeal, as is the Court of Appeal bound by its own decisions. In ***Young v Bristol Aeroplane Co Ltd*** [1946] AC 163 the exact phrase used by Viscount Simon in that case when describing the doctrine was where the court "has in a previous case pronounced on a point of law which necessarily covers a later case coming before the court…..". In the more recent case of ***Willers v Joyce*** [2016] UKSC 44, Lord Neuberger stated at [4]:
"Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence clarity and predictability."

112. It is the point of law under consideration that is important, not the nature of the application in which that point of law arises. The point under consideration here is the extent to which ATE insurance is relevant when the court is considering the issue of potential recovery of an adverse costs order against an insolvent company in liquidation. The point in ***Premier Motorauctions*** was whether ATE cover gave "sufficient protection" for the defendants. I consider that to be the same point as in the instant case, and I consider that decision to be binding. However, even if that were to be construed as a different point of law, then in any event the reasoning in that case is relevant. Given the similarities with the instant case, the decision would be highly persuasive, even if it were not strictly binding.

113. In those circumstances therefore, I do not consider the ATE cover available in this case being proffered by JDC to be sufficient. I find that it will not place the responding party, Erith, in a similar position to that which it would occupy were JDC to be solvent. However, on the basis of my finding in respect of the inadequacy of the letter of intent, this finding is not of itself determinative.

114. Mr Hussein also criticises the level of the premium payable, what he calls an "extraordinary sum of 20%" of recovery, capped at £400,000. The obvious observation is that with 55% of recovery going to Henderson Jones, and such a sizeable premium going to TM Legal, the lion's share of payment would not be going to JDC and the liquidators. However, in view of my conclusions about the inadequacy of the letter of intent, and the terms of the ATE cover itself, it is not necessary to consider this as a separate head of challenge to the grant of summary judgment.

115. My conclusions above mean that the security available (or which is said to be potentially available, were the judgment sum to be paid to Henderson Jones) by way of letter of intent (not letter of credit), and an ATE insurance policy, is in my judgment insufficient. I do not consider that the security offered is adequate to meet

the legitimate concerns that arise given JDC is in liquidation, nor can the security be properly described as providing (to use the assertion in JDC's skeleton argument) "reasonable assurances to the Defendant that, should it successfully overturn the Adjudicator's Decision in later proceedings, the Claimant will be able to (i) repay the capital sum and (ii) meet any adverse costs orders". I reject that characterisation of the security on the facts. I do not consider that the security provides sufficient safeguards to place Erith in a similar position to that which it would occupy were JDC to be solvent. In those circumstances, it is not necessary to consider in any detail the wide range of criticisms and characterisation of the agreement entered into between the liquidator and Henderson Jones.

116. I would just add that, due to this conclusion regarding the quality of the security, it is unnecessary to consider in any detail one of the points advanced by Erith, namely that the bulk of the proceeds of any summary judgment would go to Henderson Jones, TM Legal and/or JDC's solicitors, and not to the liquidator.

117. Therefore, my conclusions on the grant of summary judgment on facts of this case are as follows. There is a real risk that the summary enforcement of this adjudication decision will deprive Erith of its right to have recourse to the company's claim as security for its cross-claim, and this means that the court will refuse summary judgment.

118. In the event that JDC were not to succeed on its application (in terms of obtaining an order from the court that Erith pay it the sum of the decision), it argued primarily that a stay ought to be imposed, rather than summary judgment be denied. JDC argued that "as a matter of principle, any such issues should ordinarily by dealt with by a consideration of a conditional (or outright) stay. Indeed, all the issues in this matter can best be resolved by resort to the court's jurisdiction to draft a stay." This has been considered in other cases, and JDC rely on authorities such as ***Balfour Beatty Civil Engineering Ltd v Astec Projects Ltd (in liquidation)*** [2020] EWHC 796 (TCC). That was a decision of Waksman J, and in that case Balfour Beatty failed to obtain an injunction preventing Astec from bringing adjudication proceedings. However, that decision does not assist JDC because the case was heard and judgment delivered in February 2020, before the Supreme Court even heard the appeal in ***Bresco***.

119. The reason that I have dealt with each of the three issues in the order that I have is because, unless summary judgment is granted, the question of a stay of execution does not even arise. The dicta of Lord Briggs at [67] clearly states that where there remains a real risk that the summary enforcement of an adjudication decision will deprive the respondent of its right to have recourse to the company's claim as security for its cross-claim, then the court will be astute to refuse summary judgment. If the court has refused summary judgment, then it cannot grant a stay of execution.

120. However, in case I am wrong about that, and summary judgment would or should be granted in JDC's favour, the question of the grant of a stay would arise. I will now consider that point in the alternative, on the facts in this case.

***Issue 3 would a stay of execution be granted in any event?***

121. The principles governing a stay are as follows. CPR Part 50 incorporates into the Civil Procedure Rules (and thereby preserves) certain parts of the Rules of the

Supreme Court, including RSC Ord 47 which deals with a stay of execution. That provides as follows in Ord 47.1(a):

"(1) Where a judgment is given or an order made for the payment by any person of money and the court is satisfied on an application made at the time of the judgment, or order, or at any time thereafter by the judgment debtor or other party liable to execution –

(a) that there are special circumstances which render it inexpedient to enforce the judgment or order….

…. the court may by order stay the execution of the judgment or order…. either absolutely or for such period and subject to such conditions as the court thinks fit."

122. The probable inability on the part of the claimant to repay the sum ordered to be paid by the adjudicator is a special circumstance within the meaning of RSC Ord 47(1)(a). There are a great number of authorities in which this rule has been considered on an application to stay the execution of summary judgment obtained on enforcement of an adjudicator's decision, particularly ***Wimbledon Construction Company 2000 Ltd v Derek Vago*** [2005] EWHC 1086 (TCC) which I deal with at [124] below. In that judgment, all of the different decisions up to that date were considered, and the principles were summarised that had arisen as a result of all of those cases. ***Wimbledon v Vago*** has been used as the definitive statement for the principles to be considered on a stay of summary judgment on an adjudicator's decision for the last 15 years.

123. In my judgment, the principles the court will consider on any application for a stay are well settled, and are set out in ***Wimbledon v Vago***. Since then, they have only been subject to one small change, namely a single addition to deal with unusual circumstances concerning fraud and dissipation, in ***Gosvenor London Ltd v Aygun Aluminium UK Ltd*** [2018] EWHC 227 (TCC). The Court of Appeal in dismissing the appeal in that case at [2018] EWCA Civ 2695 upheld that addition, as well as approving (and re-stating) the principles that would apply to the grant of a stay of execution from ***Wimbledon v Vago*** at [7] to [9]. The point was also made by Coulson LJ at [9] that this had not been intended to be an inflexible list, but was a summary of the main points. In ***Bouygues v Dahl Jensen*** itself, the case also referred to by Lord Briggs in ***Bresco***, the enforcing party was in liquidation and a stay of execution was ordered in that case. As can be seen from the passage from [36] of that judgment (quoted at [38] above) this was only because the point identified on appeal by Chadwick LJ had not been argued before the judge himself (Dyson J, as he then was).

124. Coulson LJ at [8] in ***Gosvenor v Aygun*** quoted and approved the list of principles from ***Wimbledon v Vago,*** where at [26] he had, at first instance, said the following:

"[26] In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:

a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see ***AWG Construction Services v Rockingham Motor Speedway*** [2004] EWHC 888 (TCC)).

d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see ***Herschell Engineering Ltd v Breen Property Ltd*** (unreported) 28 July 2000, TCC).

e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see ***Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*** [2000] BLR 522 (CA) and ***Rainford House Ltd v Cadogan Ltd*** (unreported) 13 February 2001).

f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:
(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see ***Herschell***); or
(ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see ***Absolute Rentals v Glencor Enterprises Ltd*** (unreported) 16 January 2000, TCC)."
(emphasis added)

125. It can be seen that at [26](e) ***Wimbledon v Vago*** expressly stated that "if the claimant is in insolvent liquidation…. then a stay of execution will usually be granted." This is approved by, and incorporated into, the judgment of the Court of Appeal in ***Gosvenor v Aygun.*** Although the grant of a stay is a matter of discretion, given this dicta, the fact of insolvency is a directly relevant and material consideration to the exercise of that discretion. That is the situation here, as JDC is in insolvent liquidation. Nor can it be said that the position of JDC is the same or similar now, to its financial position when the contract was made, as it was not in insolvent liquidation when it contracted with Erith. This means the principle at [26](f)(i) does not assist JDC in resisting the imposition of a stay of execution. Accordingly, unless there are some exceptional circumstances that would justify not awarding a stay of execution, the most that JDC could achieve would be summary judgment on the sum awarded by the adjudicator, with a stay of execution.

126. Considering whether there are exceptional circumstances in this case that would justify not awarding a stay of execution (if summary judgment were otherwise to be granted) would cover the same ground as deciding whether there were a real risk that the summary enforcement of an adjudication decision would deprive the paying party of its right to have recourse to that claim as security for its cross-claim. The fact-

sensitivity of a case such as this requires consideration of the same matters under either of these two routes. The first avenue has already been considered in my analysis of the second issue above.

127. Under the second route, considering a stay of execution, the same security offered by Henderson Jones would fall to be considered. The sufficiency of that security would again have to be considered in respect of the same feature – inability to repay due to insolvency. Again, consideration would have to be given to any undertakings from the liquidators, and any other security available or offered.

128. In this case, the conclusions of the court on the adequacy of the letter of intent from Henderson Jones' bankers, and the terms of the same ATE cover, are the same, whether they are considered under the "real risk" in [62](3) of this judgment, or whether this is the "usual case" under [26](e) of ***Wimbledon v Vago.***

129. This is because the availability of sufficient security of the type discussed in general in ***Meadowside*** could, potentially, take the case out of the normal run of things where an insolvent claimant is concerned, and mean that "argue later" could have proper value to a party who sought final resolution of the substantive dispute in litigation or arbitration, to recover the sums awarded by the adjudicator.

130. As I have explained when considering the adequacy of security under the "real risk" test, the facts of this particular case are such that what is offered by JDC through Henderson Jones is insufficient. That conclusion, reconsidered afresh when applying this test under RSC Ord.47.1(a), is in favour of granting a stay of execution.

131. Therefore, because the claimant is in insolvent liquidation, in my judgment there is nothing sufficiently exceptional in this case to displace the usual order of the court to grant a stay of execution. Even if summary judgment were to be granted, the court would order a stay of execution.

132. This makes it clear, therefore, that even if I am wrong in my conclusion on Issue 2, and JDC is entitled to summary judgment, the court would grant a stay of execution in any event. The end result would be the same; JDC is not entitled to an order of the court that would order Erith to pay JDC the sum ordered by the adjudicator in his decision.

133. I would only add that this conclusion does not mean that no company in liquidation could ever achieve enforcement of an adjudicator's decision in its favour. As Lord Briggs himself identified at [67] of ***Bresco***, liquidators may offer appropriate undertakings, such as to ring-fence any enforcement proceeds. If such undertakings are available, then these would be powerful points in a claimant's favour on an application such as this, and would have a marked effect on the court's consideration of Issues 2 and 3 (as I have identified them).

***Value Added Tax***

134. One other point that I will deal with only briefly, given my conclusions on the substantive issues, is what would be the correct amount of any summary judgment

sum, were I to grant the claimant such an order (contrary to the conclusions above), given the amount ordered by the adjudicator in his decision.

135. JDC seeks a sum of approximately £1.2 million, which is the principal sum ordered by the adjudicator of £971,025.82 together with VAT and interest. Erith makes the point that JDC is, as of the date of the liquidation, not registered for VAT and therefore unable to account to HMRC for the VAT it would effectively (if it recovered VAT on the principal sum) be collecting on HMRC's behalf. This is what is known as output VAT, and is the VAT calculated and collected on the sale or supply of goods and services by JDC (which are also called "outputs").

136. Mr Hawes, the liquidator, explained in his evidence that, as of the date of liquidation, JDC de-registered for VAT, and a proof of debt has been provided by HMRC to the liquidator in the sum of £1,447,465.20 as at the date of the administration. That is an Interim Proof of Debt and shows a non-preferential claim of the sum identified, together with a preferential claim of zero. However, when one looks at the details of that sum, all save one of the items are for PAYE tax, PAYE NIC, PAYE interest and Corporation tax and interest, all owing to HMRC. None of those elements of the £1.447 million figure can, so far as I can tell on the documents provided, relate to the VAT which is claimed on the sum awarded by the adjudicator. This is because that sum was not calculated or awarded until June 2018, and the Interim Proof of Debt is stamped received by Deloittes on 28 April 2015. Given that on the date when the adjudicator made his decision JDC was not registered for VAT, and no payment has been made to JDC by Erith under the decision in any event (hence these proceedings), one could not sensibly expect VAT on the sum of the adjudication decision to form part of the Interim Proof of Debt being pursued by HMRC in the liquidation.

137. Erith maintains that, as a company de-registered for VAT, JDC could not properly charge VAT on its outputs, could not issue a valid VAT invoice to Erith, and consequently (and this explains Erith's concerns) Erith could not claim that VAT element back from HMRC as an input. JDC argue that the sum of the adjudicator's decision exceeds the annual VAT threshold for any company, also submits that the liquidators must abide by the VAT legislation, and that "JDC would be committing an offence if it were not accounting for VAT." That latter statement rather overlooks that it is only VAT-registered businesses that must account to HMRC for VAT, but I accept the underlying thrust of the submission, which is to the effect that the liquidators are responsible professionals who organise and administer the affairs of the company properly, and who must (and intend to) observe the VAT regime. The basic point of the submission is that JDC cannot, and the liquidators would not, charge VAT if that were not to be accounted to HMRC in some way. I accept that submission. The liquidators are professionals who are partners in a reputable organisation, Deloittes, and there is nothing before the court to suggest that the liquidators intend not to observe the company's obligations in terms of VAT.

138. This point does not arise for final determination given my conclusions on the summary judgment and, in the alternative, on the stay of execution issues. However, if I had been minded to order summary judgment, all of these concerns can be dealt with by including in the corresponding court order the usual terms in respect of regularising the VAT position, including the production by JDC of the relevant VAT invoice with the appropriate VAT registration number, re-registration for VAT (if that

is what is intended and/or required) and other details. All of these issues can and should be dealt with in the terms of the order itself, which is the usual way of dealing with such details. This is not to be interpreted in any particular way; it is simply a reflection of the documents before the court, and lack of clarity on this point, in the absence of detailed evidence and further argument. It was not the main point of difference between the parties, given Issues 1, 2 and 3, and I deal with it simply for completeness.

***Conclusion***

139. There are three ways that the decision of an adjudicator on a dispute, intended to be one of interim finality, can become final. This is either by positive agreement of the parties; by lack of any challenge from the losing party; or by a subsequent final decision in litigation or arbitration. This applies as much to adjudication decisions made in favour of companies in insolvent liquidation, as it does to solvent companies. In a great many cases, the first and second of those ways are the outcome, as recognised by Lord Briggs in the passage at [13] in ***Bresco*** quoted at the beginning of this judgment. The third route cannot however be ignored, and this must be addressed when enforcement is sought in a situation such as this one.

140. I would like to emphasise that it is clearly in the public interest that liquidators should be able to pursue and enforce debts owed to companies in liquidation in a cost-effective manner. There are also a variety of different methods and models available for them to do so. This judgment should not be taken in any respect as disapproval of these types of arrangement generally. It is also important to remember that simply because one party to a construction contract is in liquidation, this does not entitle the other party to that contract to a windfall. The Supreme Court in ***Bresco*** has made it clear that a company in liquidation has the right to adjudicate its disputes under a construction contract. The decision also makes it clear that the undoubted difficulties that are present in terms of enforcement in favour of companies in liquidation, and potential repayment to the paying party, are matters to be considered when summary judgment is sought, if that occurs. If adequate undertakings are available from the liquidator, or other suitable security sufficient to achieve the same purpose, then summary judgment (based on the principles I have identified above) would be available, if the "real risk" referred to by Lord Briggs was thereby avoided.

141. Adequate undertakings or other suitable security would also address one of the arguments advanced by JDC, which was that future steps by Erith to achieve final resolution of the dispute were theoretical proceedings that may, in reality, never be issued. JDC also invited the court to consider the substantive decision of the adjudicator, relying upon "the quality of the Adjudicator's Decision" to justify summary judgment. Mr Aeberli, the adjudicator, is very well known in the field, and there is no doubt that his decision is comprehensive and careful. However, this latter submission comes perilously close to arguing that adjudicators' decisions that are "right" on their face, should be treated differently to those that appear to be "wrong". The court is not in a position to determine such issues on an enforcement application, and the court will (both in this case and others) resist the invitation to become involved in that type of analysis. So far as future theoretical proceedings are concerned, if adequate undertakings had been made available, these would reflect what the position would be if those proceedings were not to occur. But no such undertakings are available and so that position does not arise.

142. In this specific case, the security offered by those acting for or behind JDC, Henderson Jones, is not, on the facts, adequate. That conclusion is sufficient to dispose of the application in Erith's favour, either under the "real risk" test which would lead to summary judgment being refused, or to take it outside the "usual case" where a stay of execution will be ordered where the claimant is in insolvent liquidation. This is a fact-specific conclusion in this case.

143. As I have explained above, JDC is not entitled to an order from the court that Erith pay JDC the sum the subject of the decision. As I have concluded that there remains a real risk that summary enforcement of this adjudication decision will deprive Erith of its right to have recourse to the company's claim as security for its cross-claim, then the court will, applying Lord Briggs dicta at [67] in ***Bresco***, refuse summary judgment. This is also consistent with the dicta of Chadwick LJ in ***Bouygues v Dahl Jensen***, who concluded that a stay should be ordered in that case, but only because the negative impact of the claimant's insolvency upon the availability of summary judgment had not been argued before Dyson J at first instance. The Supreme Court in ***Bresco*** has expressly approved those passages in ***Bouygues.***

144. However, if I am wrong, and were summary judgment to be granted to JDC, Erith would be entitled to a stay of execution in any event. As Coulson J (as he then was) stated at [26](e) of ***Wimbledon v Vago***, "the usual outcome" where a claimant is in insolvent liquidation, or where there is no dispute on the evidence that the claimant is insolvent, is that a stay of execution will usually be granted. That is the case here. The two mechanisms of security offered by Henderson Jones on behalf of JDC are insufficient, on the facts, to displace the usual outcome in this case. In my judgment, on the facts of this case, a stay of execution would be ordered, even if JDC were otherwise to be entitled to summary judgment.

145. Accordingly, the application for summary judgment fails. The amount ordered by the adjudicator in his decision of 29 June 2018 regarding the dispute between the parties on the final account for the works at the Olympic Park between 2010 and 2012 will not be summarily enforced by the court.

146. Finally, I should add some observations about procedure. I have already referred to this issue at [6] above. The TCC has developed, over many years, a streamlined and rapid procedure in adjudication business for abridging time for acknowledgement of service, serving evidence and the other steps necessary. The time limits for these steps are very tight, with a hearing brought on before a judge usually within 4 to 6 weeks. This matches the ethos and intention of adjudication, created by statute to give parties to construction contracts quick answers to disputes, often actually during construction projects themselves. However, I do not consider that procedure to be required, or even suitable, for summary judgment applications such as this one. These works were performed between 2010 and 2012, which was the origin of the dispute. The liquidation occurred in 2013, the adjudication was not commenced until 2018, and it is now 2020. The bulk of the proceeds would not go to the liquidator or the company. Further, and relevant to the issue of expedition of applications such as this one, when enforcement proceedings relating to historic claims are brought by companies in liquidation, the defendant may need time to organise its evidence. Relevant employees may have left, other contracts in relation to mutual dealings may have been

closed and the exercise is likely to be more involved, and require time for investigation, than for a more conventional adjudication enforcement claim.

147. For cases such as this one, with proceedings brought by a company in liquidation concerning a historic dispute so many years in the past, the normal time scales in the Civil Procedure Rules for acknowledgment of service and the other steps necessary for applications for summary judgment to be heard are likely to be more appropriate, with little justification for expedition. This will lead to hearings taking place within a number of months, rather than within a few weeks of issuing the claim form, but this will have two advantages. The first is enabling a defendant to meet the claim for summary judgment fairly. More may be required by way of evidence than the usual fare on a conventional adjudication enforcement by a solvent company on a more recent dispute. The second advantage is this will preserve the fast track process for those solvent parties who are in urgent need of a decision from the court on a more contemporaneous or pressing dispute. Changes to the TCC Guide are usually achieved by consensus with the TCC Users Committee, chaired by the judge in charge, and the professional users' organisations, TECBAR and TECSA. This is a point that will have to be addressed following the Supreme Court judgment in ***Bresco***. However, parties in a position similar to that occupied by JDC should not expect their claims for summary judgment to be routinely expedited in the same way as more conventional adjudication business.