

Construction Law Update

Adjudication: What if a Company is in Liquidation?

Companies in liquidation have typically encountered difficulties in seeking to enforce an adjudicator's decision in their favour. In the recent case of *Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd (in Liquidation)* the court addressed whether a company in liquidation actually has a right to refer a financial claim to adjudication at all.

Background

In August 2014, Michael J Lonsdale (Electrical) Limited ("Lonsdale") engaged Bresco Electrical Services Limited ("Bresco") to carry out electrical installation works. Bresco left site in December 2014 and both parties alleged that the other had wrongfully terminated the contract. Bresco became insolvent and a liquidator was appointed in March 2015.

In June 2018, Lonsdale received a Notice of Adjudication from Bresco seeking a decision that certain sums were due from Lonsdale. Lonsdale immediately commenced Part 8 proceedings seeking declarations and a permanent injunction preventing Bresco from bringing the adjudication.

Did the court have jurisdiction?

The court held that it did have jurisdiction to grant the injunction sought (or declarations to the same effect) but would only intervene in very rare circumstances. It was made clear that typically, adjudications should and will be permitted to proceed without court intervention, with objections to the adjudicator's jurisdiction being dealt with on enforcement.

However, this was a rare circumstance where the court felt it was appropriate to intervene.

Could Bresco refer the dispute to adjudication?

Citing the previous decisions of *Bouygues v Dahl-Jensen* and *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd*, the court held that the financial dispute between Lonsdale and Bresco could **not** be referred to

adjudication. The court held that as Bresco was in liquidation, the effect of Rule 14.25 of the Insolvency Rules 2016 (which replaced Rule 4.90 of the Insolvency Rules 1986) was that claims and cross claims between the parties were not capable of separate enforcement. Rather, they were effectively replaced with a single claim for the net balance of their mutual dealings; and that account could not be taken in adjudication proceedings. The Judge was unequivocal in his conclusions and said:

"A company in liquidation cannot refer a dispute to adjudication when that dispute includes (whether in whole or in part) determination of any claim for further sums said to be due to the referring party from the responding party."

"I would be surprised if many, or indeed any, adjudicators would decline to resign if a responding party brought the relevant passages of Bouygues, Enterprise or indeed this case to his or her attention during an adjudication."

Analysis

The judgment will no doubt have a major impact on companies in liquidation. After all, it makes clear that a company in liquidation can no longer refer a financial claim to adjudication. Liquidators will therefore need to consider alternative strategies for pursuing such claims.

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