CONTRACT & CONSTRUCTION CONSULTANTS

Can a company in liquidation adjudicate, or be adjudicated against?

Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25

Whether businesses in liquidation can either adjudicate against others or themselves be adjudicated against has been a topic of much legal discussion over the past few years. Up until now the answer from the courts has been no. This however has changed in a judgment from the Supreme Court.

Background

Michael J Lonsdale (Electrical) Ltd ("Lonsdale") engaged Bresco Electrical Services Ltd ("Bresco") to carry out electrical installation works at a site in London.

In December 2014 Bresco ceased to attend the site, alleging that it did so by way of acceptance of repudiatory breach of the Contract by Lonsdale. In March 2015 Bresco went into creditors' voluntary liquidation.

Both Bresco and Lonsdale made claims against each other for breach of the Contract. Each accused the other of repudiatory breach. Lonsdale claimed approximately £325,000 for the cost of having Bresco's works completed by another contractor. Bresco said those works were additional to the works for which it contracted, and claimed for the value of works which it had carried out under the Contract, for which it had not been paid.

Bresco (who were in liquidation) went to adjudication, seeking payment of approximately £219,000 for the value of work done, and damages for loss of profits under the Contract.

Lonsdale's response was to start court proceedings for a declaration that the adjudicator did not have jurisdiction and ask for an injunction, being an order by the court to stop the adjudication from going ahead.

Losndale's argument to the court was that the Adjudicator did not have jurisdiction due to an incompatibility between the Adjudication regime as set out in the Housing Grants, Construction and Regeneration Act 1996 which gives a right to refer a dispute at any time, and the Insolvency Rules made under the Insolvency Act 1986 which make provision for automatic set-off of cross-claims between a company in liquidation and each of its creditors, giving rise to a single net balance between them, to be ascertained by the taking of an account.

Decision

The objection to the use of adjudication in the context of insolvency was put on two grounds: jurisdiction and futility.

In respect of jurisdiction, it was argued that since insolvency set-off replaces the former cross-claims with a single claim for the net balance, there is no longer a claim, and therefore a dispute, under the construction contract. That means the adjudicator's jurisdiction is not engaged so the adjudicator does not have the power or right to make a decision. There is only a dispute about the net balance arising under the regime for insolvency set-off.

It was then argued that adjudication where one of the parties is insolvent is futile as even if there is jurisdiction, the conduct of an adjudication in the context of insolvency set-off will, generally speaking, not lead to an enforceable award, and will therefore be an exercise in futility which the court can and ordinarily should restrain by injunction. An injunction would mean that the unenforceable and therefore 'futile' adjudication could not continue.

In short, both arguments started from the premise that the two regimes are simply incompatible. Both these arguments were endorsed by the High Court in the first instance but only the futility argument prevailed in the Court of Appeal.

The Supreme Court rejected both arguments.

The Supreme Court decided that there was no incompatibility between the Insolvency Rules and adjudication. The right to adjudicate was a statutory and contractual right which the court would not lightly interfere with either on the facts of this case or as a result of the Insolvency Rules.

Further the Supreme Court did not consider adjudication by or against an insolvent company a futile exercise rather stating:

> *"In the context of construction disputes adjudication has... 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."*

The court accepted that an award against or in favour of an insolvent company may not be immediately payable (as it might be stayed) but still considered the process of Adjudication a valuable exercise.

Key advice

The key advice to take away from this case is that insolvent companies may both adjudicate against others and be adjudicated against. You cannot assume that just because the other party is insolvent that their claims have gone away. This is likely to increase the number of adjudications. However do not expect for such adjudications to necessarily lead to payment.

In addition this case emphasises that adjudication has the full backing of the Supreme Court. This means that you should take both the use and threat of adjudication very seriously. It seems there is even less scope to escape an adjudication on the grounds that it is not a useful exercise than there was before.

The best way to deal with an adjudication, whether the other party is insolvent or not, is to get good advice and engage with it. Any attempt to avoid engaging with it will likely lead to a decision against you and a costly bill to be paid.

CONTRACT & CONSTRUCTION CONSULTANTS

Contract & Construction Consultants
Cavendish House
15 Whiteladies Road, Clifton
Bristol, BS8 1PB

T: +44 (0) 117 925 9001
E: enquire@contract-consultants.com
W: www.contract-consultants.com