Insolvent Companies Can Adjudicate

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Insolvency & Adjudication are two words that I hear a lot of, but not always together. However, more recently, this has been the case.

The Court of Appeal recently provided us with further clarity on the issue of being able to adjudicate and enforce an adjudicators decision when one of the parties is insolvent.

John Doyle Construction Ltd v Erith Contractors Ltd [2021] EWCA Civ 1452 (7 October 2021) follows the prior significant Supreme Court decision in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25 (17 June 2020).*

Lookback at Bresco V Lonsdale

The Bresco case marked a change in the Courts approach to parties being able to adjudicate when a party is insolvent. In short, Bresco referred a dispute to adjudication claiming Lonsdale owed it monies for works completed and wrongful termination. Lonsdale argued the adjudicator had no jurisdiction because of Bresco having become insolvent and issued Part 8 proceedings against Bresco in the Technology and Construction Court ('TCC') for declarations and a permanent injunction to prevent the adjudication.

The Court of Appeal, contrary to the decision of the TCC, decided the adjudicator had "*theoretical jurisdiction*". However, it upheld the injunction based on incompatibilities between the insolvency regime and the adjudication regime. Lord Justice Coulson's conclusion included that an adjudication held in circumstances in which it would never be enforced was an "*exercise in futility*" which the court should restrain by way of injunction.

The Supreme Court considered the compatibility of both regimes and reached the opposite conclusion from that of the Court of Appeal on the issue of futility, concluding therefore that insolvent parties could refer a dispute to adjudication, albeit it recognised there may be some hurdles to be overcome at enforcement. Lord Briggs held that such issues will be for the judge to decide at the summary judgement stage.

John Doyle V Enrith

A short time after the Supreme Court decision in Bresco V Lonsdale, Mr. Justice Fraser heard the case of *John Doyle Construction Limited (in liquidation) v Erith Contractors Limited ("John Doyle v Enrith")* in the Technology and Construction Court ("TCC"). This was a claim for enforcement of an adjudicator's decision (of 29 June 2018), which awarded a significant sum to John Doyle by way of summary judgment under CPR Part 7, in proceedings issued by John Doyle. Erith opposed summary judgment on a number of different grounds.

Mr. Justice Fraser referenced Lord Briggs' comments in Bresco which he noted;

> *"made it clear that a company in liquidation has the right to adjudicate its disputes under a construction contract.*
>
> *…*
>
> *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."*

Considering the specific facts of John Doyle v Enrith, Mr. Justice Fraser decided that the security offered by John Doyle was inadequate and consequently summary judgment was refused and the adjudicators decision was not enforced.

The Court of Appeal upheld that judgment with Lord Justice Coulson, stating that *"any undertakings or security being offered by a claimant company in liquidation need to be clear, evidenced and unequivocal"* if it sought to enforce an adjudicators decision. It was held that John Doyle failed this test and so the appeal failed on all three grounds advanced.

The judgement then went further to deal with the question of whether or not a company in liquidation is entitled to enter judgment without regard to the paying party's set-off and counterclaim. Coulson LJ considered the effect of *Stein v Blake [1996]* where the question of set-off in an insolvency case was dealt comprehensively and the fact that a claim by or against an insolvent estate is only for the *"net balance"* of sums owed between the parties.

Consequently, in the case of John Doyle v Enrith, the Court held that if it had come to a different decision and it had in fact entered summary judgment on the part of John Doyle, it would have granted Enrith a stay of execution in relation to the whole sum. In fact, it suggested that the default position be that a stay of execution is appropriate even if summary judgment is granted.

Quigg Golden Comment

If you are a company in liquidation and you are seeking to pursue a dispute by adjudication you must ensure that you take the necessary steps to deliver a clear submission.

The implications of this latest decision are that, whilst insolvent parties have the right to refer a dispute to adjudication, the adjudicators decision is provisional and therefore it cannot finally determine the "*net balance*".