Can a company in liquidation take part in an Adjudication?

Published 17 December 2019

In ***Meadowside Building Developments Ltd (in liquidation) -v- 12-18 Hill Street Management Company Ltd*** [2019] EWHC 2651 (TCC), the Court found that in certain circumstances, it is possible for companies in liquidation to legitimately engage in adjudication proceedings.

Background

Historically, there has been some doubt as to whether or not an Adjudicator has jurisdiction to make a decision if the referring party was insolvent. This was due to the fundamental incompatibility between the adjudication process and the insolvency regime.

The position changed in the recent Court of Appeal case ***Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd; Cannon Corporate Ltd v Primus Build Ltd*** **[2019]** EWCA Civ 27, where it was found that an Adjudicator did have jurisdiction to make a decision, despite *Bresco* being in liquidation. However, because *Bresco* faced a separate cross-claim, the Court considered that to permit the adjudication to continue would be "an exercise in futility", so the injunction (to stop the adjudication from continuing) was upheld.

Still, it was noted that there may be "exceptional circumstances" in which such adjudications may be of some practical utility, but did not state what those circumstances were.

We now have further guidance on those circumstances from the decision in *Meadowside*.

What happened in *Meadowside*?

Meadowside was an application for summary enforcement of an adjudicator's decision. Although ultimately the decision was not enforced (due to an issue with the third party funding agreement), in its findings, the court expanded upon *Bresco* and described the exceptional circumstances that would allow an adjudication to continue where the referring party is insolvent. These circumstances are summarised as follows:

1. Where a liquidator is using the adjudication process purely to recover debts owed to the insolvent company (thus carrying out its statutory role under rule 14.25 of the Insolvency Rules). This basically excludes all "smash and grab" adjudications (which do not address the "true value" of the debt) and any cases where the parties have dealings under other contracts;

2. Appropriate security has been procured by the liquidator to cover any sum awarded in the adjudication (for example, a combination of ring-fencing the awarded sum, procuring ATE insurance or obtaining a bond or guarantee) such that, in the event it is subsequently overturned by way of any adverse costs order obtained in adjudication enforcement proceedings or subsequent litigation, it can be repaid; and

3. There is no abuse of process concerning the funding agreement or security put in place. For example, where a third party is engaged to recover the sums on behalf of the liquidator, its fees for doing so must not be so excessive to render the arrangement as champertous (an illegal bargain).

Although the first two exceptions had been met, the third exception had not, as the court found that the funding agreement in place breached the Damages-based Agreement Regulations 2013 *(SI 2013/609)*, rendering it champertous, and so the enforcement application failed.

Summary

In circumstances where a liquidator wishes to recover an insolvent company's debt, adjudication is now available where all three circumstances apply.

This will be seen as a welcome development for liquidators, as the adjudication process is generally a more efficient, quicker and cheaper alternative to litigation.

However, where there are cross-claims or complex contractual arrangements in place between the parties, it would be a futile exercise to refer a dispute to adjudication because it would be impossible to enforce the resulting adjudicator's decision.

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