

Adjudication update

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1. Covid-19 and adjudication
2. True value adjudications after *S&T v Grove*
3. Insolvency and adjudication

Covid-19 and adjudication



Key authority:

MillChris Developments Ltd v Waters [2020] 4 WLUK 45 – unsuccessful application for an injunction to restrain continuation of adjudication due to Covid-19 on natural justice grounds.

Other points to consider:

Risks attendant on unilateral communications:
Paice v MJ Harding [2015] EWHC 661 (TCC)

Breach of Article 1 of Protocol I to ECHR?
Whyte and Mackay Ltd v Blyth and Blyth Consulting Engineers Ltd [2012] CSOH 200

Practical points:

- Ask adjudicator to agree to dispense with hard copy documents
- Be prepared to be flexible with the timetable
- Enforcement hearings will now be remote unless objection is made
- See the new Practice Direction 51Y and TCC template order for adjudication enforcement remote hearings:

<https://www.tecsa.org.uk/news/tcc-adjustments-for-hearings-to-take-account-of-coronavirus/>

True value adjudications after *S&T v Grove* [2018] EWCA Civ 2448



The issue:

Can an employer avoid the outcome of a 'smash and grab' adjudication by relying on the decision of a subsequent 'true value' adjudication?

Facts of *S&T v Grove*:

- Grove engaged S&T to construct a new hotel at Heathrow under a JCT DB 2011 contract with bespoke amendments
- S&T made interim application for £14m. Grove issued a pay less notice showing a sum due of £1.4m. Adjudicator decided that pay less notice was invalid and ordered Grove to pay the £14m applied for.
- On enforcement, Grove argued it was entitled, in principle, to commence a further adjudication seeking a decision as to the true value of the interim application.

Coulson J in the High Court at [102]:

"The employer has to pay the sum stated as due, and could thereafter, if they wished, raise the question of the true valuation in a subsequent adjudication."

At [122]:

"following payment of the sum stated as due, the employer should be able to commence an adjudication as to the true value of the interim application."

At [141]:

"...the adjudications will still be dealt with, by adjudicators and by the courts, in strict sequence. The second adjudication cannot act as some sort of Trojan Horse to avoid paying the sum stated as due. I have made that crystal clear."

True value adjudications after *S&T v Grove* [2018] EWCA Civ 2448



Sir Rupert Jackson in the Court of Appeal at [107]:

“Both the HGCRA and the Amended Act create a hierarchy of obligations... The immediate statutory obligation is to pay the notified sum as set out in section 111. ... As a matter of statutory construction and under the terms of this contract, the adjudication provisions are subordinate to the payment provisions in section 111. ... both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation.”

A convincing analysis?

Cf. Dyson LJ in *Connex SE v Building Services Group* [2005] 1 WLR 3323 at [38-40]:

“The phrase “at any time” means exactly what it says. It would have been possible to restrict the time within which an adjudication could be commenced...but that was not done. It is clear from Hansard that the question of the time for referring a dispute to adjudication was carefully considered, and that it was decided not to provide any time limit... there is nothing in the Act which indicates that the words “at any time” should be construed as bearing other than their literal and ordinary meaning”

True value adjudications after *S&T v Grove* [2018] EWCA Civ 2448



Stuart-Smith J in *M Davenport Builders Ltd v Greer* [2019] EWHC 318 (TCC) at [35]:

“it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication.”

Cf. “embarking upon” in *S&T v Grove* at [107]

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Stuart-Smith J in *M Davenport Builders Ltd v Greer* [2019] EWHC 318 (TCC) at [37]:

“The decisions of Coulson J and the Court of Appeal in *Grove* are clear and unequivocal in stating that the employer must make payment in accordance with the contract or in accordance with section 111 of the Amended Act before it can *commence* a 'true value' adjudication. That does not mean that the Court will always restrain the commencement or progress of a true value adjudication commenced before the employer has discharged his immediate obligation... It is not necessary for me to decide whether or in what circumstances the Court may restrain the subsequent true value adjudication and, in these circumstances, it would be positively unhelpful for me to suggest examples or criteria and I do not do so.”

True value adjudications after *S&T v Grove* [2018] EWCA Civ 2448



Roger ter Haar QC sitting as a Deputy High Court Judge in *Broseley London Ltd v Prime Asset Management Ltd* [2020] EWHC 944 (TCC) at [46]:

“...Whilst the S&T decision does not expressly concern the present situation, where what is suggested as the possible subject of an as yet unstarted adjudication is the determination of a notional final account where the amount of that final account would be dependent on the validity of Decision No. 1, the ability to mount such an adjudication following upon Decision No. 3 attacking the validity of that Decision without prior payment of the amount awarded in Decision No. 1 would be a remarkable intrusion into the principle established in S&T: it would permit the adjudication system to trump the prompt payment regime, which is exactly what the Court of Appeal said in paragraph [107] of that case would not be permitted to happen.”

Insolvency and adjudication

Background



The issue: in what circumstances will an insolvent company be permitted to commence an adjudication and summarily enforce the decision?

Statutory insolvency procedures:

- Winding up (i.e. liquidation)
- Receivership
- Administration
- Company voluntary arrangement (CVA)
- Creditors' scheme of arrangement

Insolvency Rules 2016, r. 14.25: in a winding up, an account must be taken of mutual dealings and a net balance struck.

The early authorities:

Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] BLR 522 at [35-36] – where there are latent claims and cross-claims, and one of the parties is in liquidation, that is a “**compelling reason**” to refuse summary judgment (Chadwick LJ, *obiter*).

Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd [2009] EWHC 3222 (TCC) – “**fundamental clash**” between Insolvency Rules and adjudication gave rise to “**an insurmountable jurisdictional hurdle**” (Coulson J).

Insolvency and adjudication

Bresco and Primus at first instance



Lonsdale v Bresco [2018] EWHC 2043 (TCC)

Facts:

Bresco, in insolvent liquidation, began an adjudication against Lonsdale seeking declarations and payment. Lonsdale sought an injunction restraining the continuation of the adjudication.

Result:

Fraser J granted the injunction, and a declaration that:

“A company in liquidation cannot refer a dispute to adjudication when that dispute includes...determination of any claim for further sums said to be due to the referring party from the respondent party.”

Primus v Cannon [2018] EWHC 2143 (TCC)

Facts:

Primus, having entered a CVA, obtained an adjudicator’s decision in its favour and sought to enforce it in the TCC. Cannon argued that judgment should be refused, alternatively a stay granted, in view of the CVA.

Result:

Judge Waksman QC granted summary judgment and refused to impose a stay:

“there is no reason why the mere fact of a CVA should mean there can be no summary judgment.”

Insolvency and adjudication

Bresco v Lonsdale; Primus v Cannon

on appeal



Conclusions on the law

Coulson LJ held:

- An adjudicator has jurisdiction to consider a claim advanced by a company in liquidation: [35].
- However, where a company is (a) in insolvent liquidation and (b) facing a cross-claim, it will only in “**exceptional circumstances**” be permitted to refer its claim to adjudication, obtain summary judgment and avoid a stay: [54]. The liquidation will usually be a “**compelling reason**” to refuse summary judgment: see *Bouygues*. Different considerations may, depending on the facts, apply where the claimant is in a CVA rather than insolvent liquidation: [108].
- Similarly, an injunction restraining the continuation of an adjudication brought by an insolvent company will be granted “**if the court concludes that the nascent adjudication is a futile exercise**”: [55].

Insolvency and adjudication

Meadowside v 12-18 Hill Street

[2019] EWHC 2651 (TCC)



Facts:

- A claimant in insolvent liquidation obtained an adjudication decision and sought summary enforcement.
- It was common ground that the purpose of the adjudication had been to arrive at a net balance of the sums due between the parties.
- The claimant made various offers to provide the defendant with security for (i) the sum due under the decision, and (ii) costs.

Conclusions on the law:

- In an ordinary case, a company in liquidation cannot pursue an adjudication and successfully enforce the decision: [81].
- A case may be an exception to this rule if:
 - The adjudication determines the final net position between the parties under the contract: [87(1)].
 - Satisfactory security is provided in respect of (a) the sum awarded in the adjudication; (b) any adverse order for costs made in favour of the defendant concerning (i) the enforcement of the decision, and (ii) subsequent proceedings to overturn the decision: [87(2)].
- Forms, adequacy and duration of security discussed at [87(3)] and [130-151].

Insolvency and adjudication

A worked example



Balfour Beatty Civil Engineering Ltd v Astec Projects Ltd [2020] EWHC 796 (TCC)

Facts:

- Astec, in liquidation, sought to commence 3 adjudications under 3 subcontracts for work on and around Blackfriars station.
- Balfour Beatty applied to restrain the continuation of the adjudications by injunction on the grounds that the adjudications would not determine the parties' net position.
- Astec made various offers of security.

Decision:

- The fact that the 3 adjudications would not, in themselves, produce a net balance did not matter: *"netting those results off against each other...would arrive at a complete and comprehensive account of the parties' mutual dealings"*. On enforcement, the court would *"order what the net result should be"*.
- The adjudications were permitted to proceed subject to strict conditions including:
 - Adjudication notices within 21 days, and the appointment of the same adjudicator to deal with all 3 disputes.
 - The provision of security for £750,000.
 - The rewording of certain terms of Astec's legal expenses and after the event insurance policy.

Insolvency and adjudication

The position of CVAs



Coulson LJ in *Bresco v Lonsdale; Primus v Cannon* [2019] EWCA Civ 27 at [108]:

“the general position relating to a CVA may, depending on the facts, be very different to a situation where the claimant company is in insolvent liquidation. ... A CVA is, or can be, conceptually different. It is designed to try and allow the company to trade its way out of trouble. ... In those circumstances, courts should be wary of reaching any conclusions which prevent the company from endeavouring to use adjudication to trade out of its difficulties.”

Cf. *Indigo Projects London Ltd v Razin* [2019] EWHC 1205 (TCC). The court is likely to consider the following:

- Would enforcement of the adjudication interfere with the CVA? In particular:
 - Do the terms of the CVA include a requirement to strike a net balance akin to r. 14.25 of the Insolvency Rules? (**Note**: a term of this kind was present in both *Primus v Cannon* and *Indigo v Razin*).
 - If so, does the adjudication determine the final net position between the parties?
- If not, are the *Wimbledon v Vago* [2005] EWHC 1086 (TCC) criteria for a stay met?
- If so, has appropriate security been offered such as to render the stay unnecessary?

Insolvency and adjudication



Summary of key points

- There is no absolute jurisdictional bar to an insolvent claimant referring a claim to adjudication. However, absent “exceptional circumstances”, (i) the adjudication will be halted by injunction; (ii) summary judgment will be refused; or (iii) a stay of execution will be granted (see *Bresco*). There may be “exceptional circumstances” if:
 - The adjudication determines the net position between the parties.
 - Appropriate security is given for (i) the sum awarded, and (ii) the responding party’s costs.

(See *Meadowside*)
- Different insolvency processes raise different considerations and may be treated differently.

APPEAL OUTSTANDING: *Bresco v Lonsdale* appeal heard by Supreme Court on 22-23 April 2020
<https://www.supremecourt.uk/cases/uksc-2019-0036.html> - watch this space!

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