



## LEGAL BRIEFING

### *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd*

[2009] EWHC 3222 (TCC), Mr Justice Coulson

#### *The Facts*

On 5 May 1998 Thames Water Utilities Ltd engaged Thames Water Services Ltd, trading as Subterra, to carry out the repair and maintenance of mains, service pipes, and other fittings (the "Main Contract"). By a subcontract dated 13 November 2002 Subterra engaged Terry McFadden Ltd ("TML") to carry out this work in the North London area (the "Subcontract"). The Subcontract was a construction contract within the meaning of the Housing Grants (Construction & Regeneration) Act 1996 (the "Act").

On 31 August 2003 Enterprise Managed Services Ltd ("Enterprise") agreed to buy the business of, and the assets owned by, Subterra. An Asset Purchase Agreement and Novation Agreement were duly entered into. The Deed of Novation listed only the Main Contract.

Enterprise proceeded to make payments to TML. On 26 March 2004 TML submitted their final account which was criticised by Enterprise and on 21 April 2004 the Subcontract was terminated. During 2005 and 2006 three other subcontracts were entered into between TML and Subterra (one of which was not a construction contract under the Act).

In May 2006 TML became insolvent and, following this, the administrators submitted a final account for the Subcontract alleging a balance of £2.5 million. TML then went into liquidation. Claim documents were then served in relation to the other contracts between the parties. Enterprise also submitted counterclaims and later confirmed it intended to prove in the liquidation.

On 15 June 2009 the liquidators for TML entered into a deed with Tony McFadden Utilities Ltd ("Utilities") which purported to assign the balance arising out of the dealings between TML and Enterprise. Utilities gave notice of this assignment to Enterprise in September 2009 and enclosed within that a notice of adjudication regarding the Subcontract.

On 27 October 2009 Enterprise issued CPR Part 8 proceedings seeking 12 declarations including one that the adjudicator had no jurisdiction and therefore the adjudication should be aborted.

#### *The Issues*

There were a number of issues referred to the Court but for adjudication practitioners the most interesting were:

- (i) What had been assigned to Utilities?
- (ii) Could a claim under Rule 4.90 of the Insolvency Rules 1986 be adjudicated?

#### *The Decision*

Mr Justice Coulson held that, on a proper interpretation of the Deed of Assignment to Utilities, Utilities had been assigned the net balance due to them under Rule 4.90. Rule 4.90 provides that when a company goes into liquidation sums due from one party will be set off against sums due from the other. The rule is mandatory. Whilst there could be an assignment of a right to adjudicate this had not been done on the facts.

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It was not possible for Utilities to adjudicate the net balance due under Rule 4.90 for a number of reasons:

- (i) Under the Act an adjudicator can only deal with one dispute under one contract. Unless the parties agreed, an adjudicator under the Act could never undertake an adjudication under Rule 4.90 if there was more than one contract between the parties. In addition, here one of the subcontracts was not a Construction Contract within the Act;
- (ii) Enterprise had a cross claim and, as a result, it would be necessary to join in the liquidators. This was not possible with adjudication; and
- (iii) As stated by Lord Hoffmann in *Stein v Blake*, Rule 4.90 envisages the taking of a "single account" which would rule out adjudication because the results could only be obtained "piecemeal, contract by contract, and could only ever be temporarily binding".

Mr Justice Coulson further emphasised that any claim under the Subcontract had ceased to exist on the application of Rule 4.90. Because it was no longer extant, the claim under the Subcontract was incapable of assignment under the Law of Property Act 1925.

For the reasons listed above, amongst others, the adjudicator had no jurisdiction and the adjudication should be aborted.

#### **Comment**

Where one party goes into liquidation claims and cross claims are replaced by the net sums due from one party to another. The Insolvency Rules envisage the taking of a single account for which adjudication is fundamentally unsuited particularly as the result could only ever be temporarily binding unless the parties agreed otherwise.

**Claire King**  
**February 2010**