Neutral Citation Number: [2018] EWHC 2043 (TCC)

Case No: HT-2018-000186

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 31 July 2018

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

MICHAEL J LONSDALE (ELECTRICAL) LIMITED **Cla**

- and -

BRESCO ELECTRICAL SERVICES LIMITED (IN LIQUIDATION) **Defe**

- -

- -

Thomas Crangle (instructed by **Fladgate LLP**) for the **Claimant**

David Sears QC and Niall McCulloch (instructed by **Blaser Mills LLP**) for the **Defendant**

Hearing dates: 11 July 2018

Draft distributed to parties 25 July 2018

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Judgment Approved

Mr Justice Fraser:

1.
This is a claim brought in proceedings under CPR Part 8 by Michael J Lonsdale (Electrical) Ltd, the Claimant ("Lonsdale"), against Bresco Electrical Services Ltd (in Liquidation), the Defendant ("Bresco"). As can be gathered from the title of the Defendant company, it is in liquidation, a liquidator having been appointed on 12 March 2015. It is the liquidation that is at the heart of this dispute. The claim by Lonsdale is for declarations and a permanent injunction to prevent Bresco from bringing a claim to adjudication, on the basis that the liquidation operates in law in such a way as to extinguish the claim(s) relied upon by Bresco in that adjudication.

2.
The two parties had entered into a contract (actually a sub-sub-contract) dated 21 August 2014 whereby Bresco agreed to perform electrical installation works for Lonsdale. The works were at premises occupied by Rio Tinto, a major conglomerate, situated at 6 St James Square, London SW1

(which also have the address Apple Tree Yard, which was the delivery or site address). Bresco became insolvent and entered into voluntary liquidation on 12 March 2015, with one Mr Ailyan of Abbot Fielding Ltd being appointed as the liquidator.

3.
The precise terms of the contract between the parties are not material to this Part 8 claim, other than to say it is a construction contract governed by the Housing Grants Construction and Regeneration Act 1996, as amended by later enactments. This means, as is well known, that the adjudication provisions of those statutes either have to be expressly included by the parties into the construction contract, or if not, they will be statutorily imposed upon the parties, and the terms of The Scheme for Construction Contracts (England and Wales) Regulations (SI 1998 No. 649) ("the Scheme") will apply. Whether expressly included by the parties, or imposed by the Scheme, adjudication is a mandatory requirement of such contracts. In this case, Lonsdale was a sub-contractor on the JCT 2011 CM/TC form with certain amendments, which is a standard form of building contract, and the contract between Lonsdale and Bresco was on the standard order form of Lonsdale and was given Order No. SC/162048/EE1251/1301. The contract sum was £360,000.

4.
The chronological sequence of the parties' dealings need not be considered in any great detail, as it does not have any material impact upon the issues to be decided. Bresco left the site in December 2014 in controversial circumstances, with each of Bresco and Lonsdale alleging wrongful termination against the other. On 12 March 2015 Bresco, the company, became controlled by the liquidator as a result of the liquidation. He performed his duties under the relevant legislation and prepared three annual reports on Bresco's affairs, as required by the Insolvency Act 1986. In late October 2017, Lonsdale intimated a claim against Bresco alleging that Bresco had wrongfully terminated the contract, and claiming the direct costs of completing the works said to have been caused by this termination, those works having been performed by GSV Electrical Ltd. GSV Electrical had been appointed by Lonsdale, it was said, to complete works left undone by Bresco. Bresco, on the other hand, maintained in response that it was Lonsdale who had wrongfully terminated Bresco's employment under the contract, and that it was Lonsdale who owed Bresco money. At about this point an entity called Pythagoras Capital Ltd commenced writing letters, said to be for and on behalf of the liquidator.

5.
On 18 June 2018 Lonsdale received a Notice of Intention to Refer a Dispute to Adjudication ("the Notice"). That was signed by Mr Greg McMahon, described as a Director of Pythagoras Capital Ltd, for and on behalf of Bresco. There was some controversy between the parties about what the role of Pythagoras was, and whether the necessary authority had been granted by the liquidator to Pythagoras to act on Bresco's behalf. I do not need to resolve that for this reason; in these proceedings Bresco was represented by both solicitors and leading and junior counsel, the legal nature of the matters under consideration does not depend upon the status of Pythagoras and the extent of its authority or otherwise, and I was not asked to consider this point at all. No issue arises in these proceedings regarding the validity of the Notice due to any lack of authority to issue or serve such a document. The matter has proceeded on the basis that it was a valid Notice in the sense that (absent Lonsdale's legal objections which I will determine) Bresco initiated an adjudication against Lonsdale in relation to a dispute under the contract to which I have referred in [2] above.

6.
The Notice defined this dispute in the following way in paragraph 7:

“A dispute has arisen between the parties under the Contract. Bresco seeks the appointment of an Adjudicator to make the following decisions:

a. Whether Lonsdale committed a repudiatory breach on 8 December 2014 by employing others to complete the Works.

b. Whether Bresco is entitled to be paid for the work that it had completed prior to Lonsdale’s repudiatory breach.

c. Whether Bresco had completed works to the value of £219,884.80, £193,067.80 or such other sum as the Adjudicator may decide prior to Lonsdale’s repudiatory breach.

d. Whether Bresco is entitled to be paid for the works that it had completed, but for which it has not been paid, pursuant to the Contract, as a matter of quantum meruit or otherwise.

e. Whether Bresco is also entitled to damages for loss of profits for Works that it had not completed as a consequence of Lonsdale’s repudiatory breach.

f. Whether Lonsdale is not entitled to deduct, from the sums that it owes Bresco, any completion costs or other sums. Alternatively, what sums is Lonsdale entitled to deduct.

g. What interest is Bresco entitled to be paid pursuant to the Contract, the Late Payment of Commercial Debts (Interest) Act 1998 or otherwise.”

7.
This Notice arguably seeks to refer more than one dispute to the adjudicator. Indeed, there are potentially at least four disputes contained in paragraph 7 of the Notice. They are whether Lonsdale committed a repudiatory breach of contract; whether Bresco completed works to a particular value; whether Bresco is entitled to be paid for work it had completed, and what amount it had in fact been paid in respect of work it had performed; and also whether Bresco was entitled to damages for loss of profits (and potentially, how much those damages were). There is no further reference at all within the Referral Notice (“the Referral”) itself further to identify with precision (or at all) what “the dispute” is, so the Notice is the only relevant document that permits one to construe what was being referred. All the Referral did was to reproduce paragraph 7 of the Notice.

8.
However, both parties before me maintained that this Notice referred a single dispute to adjudication. Given that the nature of the issues that arise on this Part 8 claim require resolution in any event, I proceed on that basis. However, Mr Sears QC accepted that at least three of the decisions sought from the adjudicator were in relation to a decision that a particular money sum was due to Bresco from Lonsdale. That is clearly right – and the Notice does indeed do this, whether the matters referred to the adjudicator are properly seen as being one dispute, or a greater number than that. The relevance of seeking a decision (or decisions) concerning sums due will be seen in due course. It is therefore the case that the dispute (if there is only one), however it is framed, seeks a decision from the adjudicator that particular sums are due to Bresco from Lonsdale, by way of payments under the contract for works done and/or damages for loss of profits.

Procedural history

9.
There is no substantial dispute of fact between the parties, which is a requirement for proceedings to be commenced under CPR Part 8. I had witness statements from Mr Digby Hebberd of Lonsdale’s

solicitors, and Mr Gregory McMahon of Pythagoras for Bresco, but these together simply provided the necessary background facts, none of which are controversial.

10.
In **Merit Holdings Ltd v Michael J Lonsdale Ltd** [2017] EWHC 2450 (TCC) Jefford J at [17] to [28] made certain comments about the appropriateness (or more accurately in that case, the inappropriateness) of the Part 8 procedure being seen by parties to adjudication business in the Technology and Construction Court as constituting a convenient short-cut for them to avoid the usual waiting times for litigants. Part 8 proceedings are also seen (by some parties) as a way of keeping the interval between the two components of the "pay now, argue later" ethos of adjudication as short as humanly possible. The comments of Jefford J were then repeated in **Victory House General Partner Ltd v RGB P&C Ltd** [2018] EWHC 102 (TCC) by Ms Joanna Smith QC sitting as a Deputy High Court Judge, who found herself facing a party whose counsel submitted (as explained in the judgment at [6]):

"that issues could be resolved in the Part 8 proceedings on the basis of assumed facts, but that in the event of the decision being unfavourable to his client, he would then be in a position to challenge any disputed matters of fact at a later time in further substantive proceedings."

11.
This inventive creation of an entirely new ad hoc procedure by counsel was correctly rejected in **Victory House**. Proceedings under CPR Part 8 will only be entertained by the court where there is no substantive dispute on the facts, and also should not be seen as a means for parties to obtain favourable treatment in terms of having resolution by the court performed more quickly, and to a preferential timetable, than other litigants. Having said that, the court will always seek to list matters that are properly urgent as soon as is practicable, taking into account the relevant circumstances.

12.
Injunctive relief is not usually sought under CPR Part 8, although it may be a consequence of the declarations made by the court that a party is enjoined (as a matter of law) not to take certain steps. Mr Sears QC for Bresco submitted that it was inappropriate for the court to consider injunctive relief to interfere in an ongoing adjudication. This argument has been dismissed before in other cases. Coulson J (as he then was) stated in **The Dorchester Hotel Ltd v Vivid Interiors Ltd** [2009] EWHC 70 (TCC) the following:

"15. In developing his jurisdiction argument Mr Buckingham, on behalf of the Defendant, argued that the declarations sought by the Claimant in this case were akin to an injunction and that, by reference to the decision of HHJ Wilcox in **Workplace Technologies plc v E Squared Ltd** [2000] CILL 1607, the Court did not have the necessary jurisdiction to grant such an injunction. I am not persuaded that the declarations sought here are akin to an injunction, but even if it was, I am clear that in **Workplace Technologies** HHJ Wilcox did not say that the Court did not have the jurisdiction to grant an injunction. What he properly emphasised was that such an injunction would only rarely be granted, which is a very different thing.

16. Mr Buckingham's other submission was that, since the declarations sought went to the Adjudicator's discretion to fix his own timetable and to conduct the adjudication in a manner which he saw fit, the Court should not entertain an application which would interfere with that discretion. In my judgment, that submission has greater force, but it does again seem to me to be a matter of fact and degree, rather than a matter of principle. Again, I would conclude that, if the Court decided that this was one of those very rare cases where the Adjudicator's exercise of his discretion was in some way

fundamentally wrong in law, the Court should not sit idly by until the adjudication is finished and contested enforcement proceedings are in train.

17. Accordingly, for these reasons, I have concluded that the TCC does have the jurisdiction to consider the application for a declaration in this case. But I make it clear, as I hope I made clear in argument, that such a jurisdiction will be exercised very sparingly. It will only be appropriate in rare cases for the TCC to intervene in an ongoing adjudication. It is important that, wherever possible, the adjudication process is allowed to operate free from the intervention of the Court. Applications of this sort will be very much the exception rather than the rule. They will only be granted in clear-cut cases such as (I venture to suggest) those that existed in **CJP Builders**."

(emphasis added)

13.
I fully agree with that dicta. To be clear therefore, the court undoubtedly has jurisdiction to grant an injunction in an ongoing adjudication. This is clear from the passages above in **Dorchester Hotel v Vivid Interiors**, and also from other statements by the same judge in **Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd** [2009] EWHC 3222 (TCC). In that case (which is addressed in some detail below) the decision of the judge at [104] was that "the adjudicator does not have the requisite jurisdiction and the present adjudication must be aborted." This is akin to an injunction, as argued in **Dorchester**. There is no doubt that the court does have the necessary jurisdiction to grant an injunction in an ongoing adjudication.

14.
What these cases make clear is that although the court has the necessary jurisdiction to grant an injunction in respect of an ongoing adjudication, it will only do so very rarely and in very clear cut cases. It must therefore follow that it has jurisdiction to make declarations that may have the same effect as the grant of an injunction. However the relief is expressed, the usual approach where a party challenges the jurisdiction of an adjudicator is for that matter to be raised at the enforcement stage.

15.
The jurisdiction of the court to grant such relief, however, must be exercised with very great care, and I must repeat that it will only be in extremely rare cases that the court will ever interfere in an ongoing adjudication. There are some isolated cases in which it has been done, such as **Twintec Ltd v Volker Fitzpatrick Ltd** [2014] EWHC 10 (TCC). In that case, Edwards-Stuart J stated the following, in relation to a submission that the adjudication should proceed because the appropriate time for the court to intervene would be at the enforcement stage. This is similar to the submissions made by Mr Sears QC in this case.

"[63] I do not accept this submission. By section 37 of the Senior Courts Act 1981, the court may grant an injunction in all cases in which it appears to the court to be just and convenient to do so. In **Mentmore Towers Ltd v Packman Lucas Ltd** [2010] EWHC 457 (TCC) , I held that the court had jurisdiction to restrain the pursuit of an adjudication under section 37, and neither party has challenged that conclusion. I am unable to see how it would be either just or convenient to permit an adjudication to continue in circumstances where the decision of the adjudicator will be incapable of enforcement. In the present case if the adjudication went ahead and the adjudicator purported to give a decision in Twintec's favour, that decision would not be binding on VFL. Precisely the same issue would still have to be resolved in the litigation."

16.

I do not wish parties to adjudications generally to read any element of this judgment and conclude that CPR Part 8 represents a short cut available to them in conventional cases, or as any encouragement to seek injunctions to restrain ongoing adjudications. Such proceedings will only be considered suitable or even arguable in very rare cases.

17.
Here, the Notice was issued on Bresco's behalf on 18 June 2018 and on 21 June 2018 the RICS, one of the industry appointing bodies, notified the parties that Mr Tony Bingham had been appointed as the adjudicator. In the circumstances I explain at [18] to [20] the adjudication continued after the issue of these Part 8 proceedings by Lonsdale.

18.
The adjudicator, Mr Bingham, was invited to resign by the solicitors acting for Lonsdale, and Bresco was also (in the sense that the letter was sent to Pythagoras, acting for Bresco) invited to discontinue with the adjudication. The basis for both of these requests was that the adjudicator had no jurisdiction as a result of Bresco having become insolvent and placed into liquidation, together with other associated matters (such as the liquidator's different reports not referring to any debt owed to Bresco by Lonsdale). However, Bresco was not prepared to discontinue the adjudication, and the adjudicator did not resign. He proposed a timetable that would have led to a decision being issued by him on 16 August 2018.

19.
He also issued what he described as a "non-binding decision" on the points raised by Lonsdale, in particular the insolvency/liquidation issues, and rejected them, declaring that he did have jurisdiction to determine the dispute. Lonsdale therefore issued these Part 8 proceedings on 26 June 2018 and an order was made by me on 2 July 2018, including setting down a hearing for 4 July 2018 for directions and consideration of what, if any, orders ought to be made in relation to the then-ongoing adjudication pending hearing of the Part 8 claim. That could not be heard until the following week. The earliest possible date (taking into account the court's availability to accommodate such a hearing with a time estimate of half a day) was 11 July 2018. As matters transpired, the hearing on 4 July 2018 was not necessary because the parties agreed between themselves the following:

"that the Adjudication be stayed with neither party nor the Adjudicator taking any further step therein pending the determination of the Claimant's claim for declarations and a permanent injunction and with the Adjudicator having an extension to the date for issuing his decision corresponding with the period of the stay".

This was contained in a consent order approved by the court and sealed on 4 July 2018.

20.
The benefits of this entirely sensible step were potentially undermined when the adjudicator, having been notified of the stay (and somewhat in advance of the timetable he had originally suggested) wrote to the parties on 5 July 2018 stating that he had reached a decision, could give his answers to the issues raised immediately, with a reasoned decision to be produced the following day. It was pointed out to him that this would be in breach both of the parties' agreement and also the consent order approved by the court, and that the parties did not consider the court would necessarily be assisted by his reasoned (or indeed any) decision in any event. The adjudication therefore remains stayed by consent, awaiting this judgment.

The issues for resolution

21.
The parties could not agree on how the issue for resolution in these Part 8 proceedings should be framed. They both agreed it related to the liquidation of Bresco, the effect of the Insolvency Rules 2016 upon the parties' rights, and therefore the jurisdiction of the adjudicator to deal with the dispute referred to him. There is no doubt that these are the most important and relevant component parts of the issue before the court.

22.
In my judgment, the issue can be framed as follows. It is whether a company in liquidation can refer a dispute to adjudication when that dispute includes (whether in whole or in part) determination of a claim for further sums said to be due to the referring party from the responding party?

23.
The correct starting point is the Insolvency (England and Wales) Rules 2016 themselves ("the 2016 Rules"). These are contained in secondary legislation in SI 2016/1024. They give effect to Parts 1 to 11 of the Insolvency Act 1986 and to the EC Regulation. The parties both proceeded on the basis that these rules were the ones that applied, even though the liquidator was appointed (and hence the liquidation commenced) on 12 March 2015, and hence prior to the coming into force of the 2016 Rules on 6 April 2017. The parties expressly agreed that the issue should be determined on the basis of the 2016 Rules. However, I invited and received written submissions on this point after the hearing. This is a point to which I will return at [75] below.

24.
In any event, although the 2016 Rules replaced an earlier version, namely the Insolvency Rules 1986 ("the 1986 Rules"), the basic arguments relevant to the issue in this case are the same on both versions of the Rules. I will analyse the issue by reference to the 2016 Rules, both because of the agreement of the parties to which I have referred, and because these are likely to be of wider application in other cases.

25.
Rule 14.25 provides as follows:

"Winding up: mutual dealings and set-off

14.25 (1) This rule applies in a winding up where, before the company goes into liquidation, there have been mutual dealings between the company and a creditor of the company proving or claiming to prove for a debt in the liquidation.

(2) An account must be taken of what is due from the company and the creditor to each other in respect of their mutual dealings and the sums due from the one must be set off against the sums due from the other.

(3) If there is a balance owed to the creditor then only that balance is provable in the winding up.

(4) If there is a balance owed to the company then that must be paid to the liquidator as part of the assets.

(5) However if all or part of the balance owed to the company results from a contingent or prospective debt owed by the creditor then the balance (or that part of it which results from the contingent or prospective debt) must be paid in full (without being discounted under rule 14.44) if and when that debt becomes due and payable.

(6) In this rule—

“obligation” means an obligation however arising, whether by virtue of an agreement, rule of law or otherwise; and

“mutual dealings” means mutual credits, mutual debts or other mutual dealings between the company and a creditor proving or claiming to prove for a debt in the winding up but does not include any of the following—

(a) a debt arising out of an obligation incurred at a time when the creditor had notice that—

(i) a decision had been sought from creditors on the nomination of a liquidator under section 100, or

(ii) a petition for the winding up of the company was pending;

(b) a debt arising out of an obligation where—

(i) the liquidation was immediately preceded by an administration, and

(ii) at the time the obligation was incurred the creditor had notice that an application for an administration order was pending or a person had delivered notice of intention to appoint an administrator; and

(c) a debt arising out of an obligation incurred during an administration which immediately preceded the liquidation;

(d) a debt which has been acquired by a creditor by assignment or otherwise, under an agreement between the creditor and another party where that agreement was entered into—

(i) after the company went into liquidation,

(ii) at a time when the creditor had notice that a decision had been sought from creditors under section 100 on the nomination of a liquidator,

(iii) at a time when the creditor had notice that a winding-up petition was pending,

(iv) where the winding up was immediately preceded by an administration at a time when the creditor had notice that an application for an administration order was pending or a person had delivered notice of intention to appoint an administrator, or

(v) during an administration which immediately preceded the winding up.

(7) A sum must be treated as being due to or from the company for the purposes of paragraph (2) whether—

(a) it is payable at present or in the future;

(b) the obligation by virtue of which it is payable is certain or contingent; or

(c) its amount is fixed or liquidated, or is capable of being ascertained by

fixed rules or as a matter of opinion.

(8) For the purposes of this rule—

(a) rule 14.14 applies to an obligation which, by reason of its being subject to

a contingency or for any other reason, does not bear a certain value;

(b) rules 14.21 to 14.23 apply to sums due to the company which—

(i) are payable in a currency other than sterling,

(ii) are of a periodical nature, or

(iii) bear interest; and

(c) rule 14.44 applies to a sum due to or from the company which is payable

in the future."

26.
The previous incarnation of Rule 14.25 in the Insolvency Rules 1986 was rule 4.90. That rule had stated:

"(1) This rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation.

(2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other.

(3) ...

(4) Only the balance (if any) of the account is provable in the liquidation. Alternatively (as the case may be) the amount shall be paid to the liquidator as part of the assets."

27.
This rule was the subject of judicial consideration at the highest level by the House of Lords in **Stein v Blake** [1996] AC 243. Lord Hoffman was considering in that case an individual bankrupt, and the provisions of section 323 of the Insolvency Act 1986, which are the ones applicable in bankruptcy (which is the insolvency of an individual, and not a company). However, the provisions of section 323 of the Insolvency Act 1986 and Rule 4.90 of the Rules are indistinguishable. The 1986 Act incorporated into corporate insolvency, provisions which had been part of the law in relation to individual bankruptcy. A company in insolvent liquidation is, for these purposes, not distinguishable from an individual in bankruptcy, although in terms of legal personality there are of course differences. A liquidator controls the company rather than the board of directors; the company remains as a legal entity. A liquidator is not therefore in precisely the same position as a trustee in bankruptcy, who acts in place of the bankrupt, a different natural legal person. However, for present purposes that does not in my judgment matter. This case concerns a company in liquidation.

28.
Lord Hoffman considered the effect of the insolvency provisions upon what is called bankruptcy set-off, which is distinct from legal set-off. He stated at 251D-F the following:

"Bankruptcy set-off, on the other hand, affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for or pay only the balance. So in **Forster v Wilson** (1843) 12 M & W. 191, 204, Parke B said that the purpose of insolvency set-off was 'to do substantial justice

between the parties'. Although it is often said the justice of the rule is obvious, it is worth noticing that it is by no means universal. It has however been part of the English law of bankruptcy since at least the time of the first Queen Elizabeth."

(emphasis added)

29.
The well-known text book **Derham on the Law of Set Off** (4th ed. 2010 Oxford Univ. Press) states at 6-123 that the same analysis that applies to personal bankruptcy "is equally applicable in company liquidation, with set-offs taking place automatically on the date of the liquidation".

30.
There are some minor differences in the wording between Rule 4.90 of the 1986 Rules and Rule 14.25 of the 2016 Rules. The former states that:

"An account shall be taken of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other"

The latter states:

"An account must be taken of what is due from the company and the creditor to each other in respect of their mutual dealings and the sums due from the one must be set off against the sums due from the other."

31.
I do not consider that these minor differences in wording make any difference to the issue before the court in these Part 8 proceedings. Even if they did, the use of the expression in the 2016 Rules "an account must be taken" makes it clear that the provisions are mandatory. That account includes, and consists of, analysis of the parties' "mutual dealings" with set off of the different sums due in each direction to arrive at a single balance.

32.
Concentrating on the 2016 Rules, "mutual dealings" are defined thus:

"mutual dealings" means mutual credits, mutual debts or other mutual dealings between the company and a creditor proving or claiming to prove for a debt in the winding up but does not include any of the following"

and exceptions then follow at Rule 14.25(6)(a) to (d). None of those exceptions apply here.

33.
I consider that sums claimed to be due from Lonsdale to Bresco, and sums claimed from Bresco to be due to Lonsdale, clearly fall within the definition of "mutual dealings" and are therefore caught by the requirement under the Rule. They are plainly mutual credits and/or mutual debts between the company in liquidation (Bresco) and the creditor (Lonsdale). Upon liquidation, the Insolvency Rules (which have statutory force) require that an account must be taken of those dealings in each direction to arrive at a single balance due either to, or from, the company in liquidation. Such categorisation of these sums includes the sums the subject matter of the dispute referred to adjudication in this case.

34.
This is the essence of what bankruptcy set-off in law consists of, and is. For a company, it occurs upon the date of liquidation. The range of claims and cross-claims between companies such as Lonsdale and

Bresco are all merged into one single balance being due in one direction. Those claims and cross-claims need not arise under a single contract; the “mutual dealings” between them can (and very often do) arise under a whole number of different contracts. However, the effect is the same, whether the mutual dealings arise from a single contract, or multiple contracts. A creditor of a company in insolvent liquidation with claims against him (or her) from that company, finds themselves in a different position to creditors of such a company with no such claims. Under the principle of bankruptcy set-off, the creditor in the former situation can set off, pound for pound, the amount he (or she) owes the company and only either pay to the liquidator (if the balance is in the company’s direction) or prove for (if the balance is in his or her favour) the single resulting balance. An ordinary creditor with no such debts owed from the company proves for the debt in the liquidation with all the other creditors, but will not receive pound for pound relief on any part of it. Whatever dividend is available (if any) is paid out to all unsecured creditors equally.

35.
That exercise of discerning or calculating the balance due, and in which direction, is performed by taking the account to which the Rules refer, and which is imposed upon the parties by the legal operation of those Rules.

36.
Within the sphere of adjudication, the operation of the Insolvency Rules and the abilities of companies in liquidation to enforce the decisions of adjudicators have been considered before. In **Bouygues v Dahl-Jensen** [2000] EWCA Civ 507 the Court of Appeal considered an appeal against the grant of summary judgment by Dyson J (as he then was) where there was an error of arithmetic on the face of an adjudicator’s decision. The clear error concerned how retention was dealt with in the calculation of the account, and the error meant that the conclusion of the decision was a payment to Dahl-Jensen from Bouygues of approximately £200,000. Absent the error, the correct calculation dealing with retention correctly should have led to a payment in the other direction to Bouygues from Dahl-Jensen of approximately £140,000. The judge at first instance granted Dahl-Jensen summary judgment despite the error, and the case is usually cited as authority for the proposition that an adjudicator’s decision will be enforced by the court regardless of whether it is correct in fact or in law. It plainly is authority for that proposition. On this issue the case went on appeal. The grant of summary judgment was upheld, and the appeal dismissed. Whether faulty arithmetic is an error of fact, or law (as it also contravenes the laws of mathematics) was neither explored nor relevant. A stay of execution was however imposed.

37.
At [33] to [35] Chadwick LJ stated the following, having explained the operation of the principle of bankruptcy set-off and referring to the speech of Lord Hoffman in **Stein v Blake** set out above:

“[33] The importance of the rule is illustrated by the circumstances in the present case. If Bouygues is obliged to pay to Dahl-Jensen the amount awarded by the adjudicator, those monies, when received by the liquidator of Dahl-Jensen, will form part of the fund applicable for distribution amongst Dahl-Jensen's creditors. If Bouygues itself has a claim under the construction contract, as it currently asserts, and is required to prove for that claim in the liquidation of Dahl-Jensen, it will receive only a dividend pro rata to the amount of its claim. It will be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim.

[34] Lord Hoffman pointed out, at page 252 in **Stein v Blake** that the bankruptcy set-off requires an account to be taken of liabilities which at the time of the bankruptcy may be due but not yet payable,

or which may be unascertained in amount or subject to contingency. Nevertheless, the insolvency code requires that the account shall be deemed to have been taken, and the sums due from one party shall be set off against the other, as at the date of insolvency order. Lord Hoffman pointed out also that it was an incident of the rule that claims and cross-claims merge and are extinguished; so that, as between the insolvent and the other party, there is only a single claim - represented by the balance of the account between them. In those circumstances it is difficult to see how a summary judgment can be of any advantage to either party where, as the 1996 Act and paragraph 31 of the Model Adjudication Procedure make clear, the account can be reopened at some stage; and has to be reopened in the insolvency of Dahl-Jensen.

[35] Part 24, rule 2 of the Civil Procedure Rules enables the court to give summary judgment on the whole of a claim, or on a particular issue, if it considers that the defendant has no real prospect of successfully defending the claim and there is no other reason why the case or issue should be disposed of at a trial. In circumstances such as the present, where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in the liquidation, in which full account can be taken and a balance struck. That is what rule 4.90 of the Insolvency Rules 1986 requires."

(emphasis added)

38.
At [29] Chadwick LJ had made clear that Dahl-Jensen was in liquidation at the date of the application for summary judgment, and indeed at the date of the reference to adjudication. He concluded:

"[36] It seems to me that those matters ought to have been considered on the application for summary judgment. But the point was not taken before the judge and his attention was not, it seems, drawn to the provisions of the Insolvency Rules 1986. Nor was the point taken in the notice of appeal. Nor was it embraced by counsel for the appellant with any enthusiasm when it was drawn to his attention by this Court. In those circumstances - and in the circumstances that the effect of the summary judgment is substantially negated by the stay of execution which this court will impose - I do not think it right to set aside an order made by the judge in the exercise of his discretion. I too would dismiss this appeal."

(Emphasis added)

39.
Accordingly, the outcome on that appeal was that the appeal against the grant of summary judgment was dismissed, but a stay of execution was granted which "substantially negated" the effect of the summary judgment. The judgment makes clear that even when the Court of Appeal itself raised the insolvency point (and the effect of that upon the claims and cross-claims) with the parties during the appeal, it was not "embraced…. with any enthusiasm". The effect of the liquidation was plainly relevant to the outcome of the appeal. However, that particular point was not fully argued before the Court of Appeal. Mr Sears QC relies upon the fact that Chadwick LJ expressly did not state that the liquidation went to the jurisdiction of the adjudicator as justifying his submission to like effect in this case. However, I reject that submission. Chadwick LJ did not come to a final conclusion regarding the effect of the liquidation upon the legal nature of the dispute between the parties in terms of the jurisdiction of the adjudicator, because the point was not fully argued and there was no need for him to do so. He did however make clear what the effect of the Insolvency Rules – then, the 1986 Rules – was upon the claims and cross-claims.

40.
The next case relied upon by both parties is that of Coulson J (as he then was) in **Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd** [2009] EWHC 3222 (TCC).

41.
At [2], the issue in that case described by the judge as being “of potentially wide application” was as follows:

“It is this: to what extent, if at all, does an adjudicator appointed under the Housing Grants (Construction and Regeneration) Act 1996 (“the Act”) have the jurisdiction to take an account and identify a net balance due arising out of mutual dealings between the parties pursuant to Rule 4.90 of the Insolvency Rules 1986?”

42.
That case had some marked differences to the instant one. In 1998 Thames Water Utilities Ltd had engaged Thames Water Services Ltd, trading as Subterra (“Subterra”), to carry out the repair and maintenance of mains, service pipes, and other fittings in connection with water supply. By a Sub-Contract entered into in November 2002 Subterra had engaged Tony McFadden Limited (“TML”) to carry out this work in the North London area. This was known as the NLSDA Sub-Contract and was a construction contract within the meaning of the 1996 Act. In August 2003 Enterprise agreed to buy the business of, and the assets owned by, Subterra. In April 2004 Enterprise terminated the engagement of TML. Subsequently in 2005 and 2006 Enterprise engaged TML on another Sub-Contract referred to as “The Lot 8 Sub-Contract”, and also agreed two other smaller Sub-Contracts, one being called the Three Valleys Sub-Contract and the other a more informal van hire Sub-Contract. In May 2006 TML went into administration and, in consequence, the Lot 8 Sub-Contract was terminated. In September 2007, TML’s administrators submitted a Final Account to Enterprise in relation to the NLSDA Sub-Contract seeking an alleged balance due of about £2.5 million. No sums were paid. On 19 November 2007 joint liquidators of TML were appointed. Thereafter, TML’s liquidators served what was called a ‘Pre- Action Adjudication Statement’ on Enterprise, which set out their detailed claim in respect of the NLSDA Sub-Contract. Similar claim documents were also served in relation to the Lot 8 Sub-Contract. TML’s claim was for some £2.6 million. In October 2008, Enterprise served their own claim against TML in relation to the Lot 8 Sub-Contract, based on alleged overpayments. On the basis of Enterprise’s analysis, a sum in excess of £3 million was then said to have been overpaid to TML in respect of the Lot 8 works. On 29 December 2008 Enterprise confirmed their intention to prove in the liquidation. In June 2009 (although Enterprise were not aware of it) the liquidators assigned to Tony McFadden Utilities Ltd (“Utilities”) what was called “the Net EMSL Balance”, “EMSL” being the shorthand description of Enterprise. On 21 September 2009, Utilities’ solicitors wrote to Enterprise notifying it of their appointment and the assignment. It also stated that there was “a dispute with regard to the valuation of the final account submitted by Tony McFadden Limited to you in relation to this Contract and, accordingly, we enclose Notice of Intention to Adjudicate” The letter also served an Adjudication Notice, which sought payment of approximately £2.5 million said to be due by reference only to the NLSDA Sub-Contract. Utilities then served the Referral Notice in the adjudication. Thereafter Enterprise issued Part 8 proceedings against Utilities, seeking a total of 12 declarations.

43.
The issues are at [16] in the judgment and were as follows:

(a) Was the NLSDA Sub-Contract between Subterra and TML novated in favour of Enterprise?

(b) What rights and liabilities were the subject of the Deed of Assignment of 15th June 2009 between TML and Utilities?

(c) Was the Deed a valid assignment?

(d) Can Utilities as assignees adjudicate the NLSDA claim against Enterprise?

(e) Does the Adjudicator have the necessary jurisdiction to undertake this adjudication?

44.
It is only necessary to consider the last two of those five issues above, and the penultimate one only in part. Despite the arguments in each direction about the validity of the assignment, the judgment inevitably considered the nature of the underlying dispute which had been referred to adjudication. The relevant passages of the judgment are as follows:

"65. In my analysis, Utilities have not sought to refer to adjudication the dispute as to their right to an account and a balance due under Rule 4.90. Instead, they have purported to refer to adjudication TML's disputed claim against Enterprise under the novated NLSDA Sub-Contract. That is the only claim identified in the Adjudication Notice which is, of course, the document from which the Adjudicator derives his jurisdiction: see **Griffin v. Midas Homes** [2000] 78 Con LR 152. Moreover, one of the decisions sought by Utilities is to the effect that Enterprise cannot in the adjudication rely on their Lot 8 claim, which is entirely consistent with their stance that only the NLSDA dispute has been referred. However, for the reasons set out below, I am in no doubt that Utilities did not have the right to refer to adjudication, or seek to ringfence within that adjudication, the dispute under the NLSDA Sub-Contract, which is just one element of the Rule 4.90 mechanism.

66. First, I conclude that, as a matter of law, the claim for sums due under the NLSDA Sub-Contract has, in the unequivocal words of Lord Hoffmann in **Stein v. Blake**, "ceased to exist". Following the liquidation of TML and the assignment of the right under Rule 4.90, as he put it, "the only chose in action which continued to exist as an assignable item of property was the claim to a net balance". Thus the claim under the NLSDA Sub-Contract could not be and was not assigned to Utilities. Because it was no longer extant, it was incapable of assignment under the **Law of Property Act 1925**.

67. Miss Barwise argued that the claim under the NLSDA Sub-Contract did continue to exist because that was the way in which the balance could be ascertained under Rule 4.90. It seems to me that that suggestion was roundly rejected by Lord Hoffmann in **Stein v. Blake** at page 255F of the report, where he said in terms that such a claim was "merely part of the process of retrospective calculation" and repeated that the only claim which could now exist was the claim to the net balance.

68. Accordingly, I find that the only chose in action which TML's liquidators could assign, and did assign, was the claim to a net balance which arose out of the mutual dealings on four separate Sub-Contracts, at least one of which was not even a construction contract. That claim could not be referred to adjudication for the reasons noted at paragraphs 61-64 above.

69. Secondly, in the absence of any agreement between the parties, it would not be in accordance with the Insolvency Rules for the calculation of the net balance under Rule 4.90 to be performed in what might be described as a piecemeal or hobbled fashion. Even if the original claim under the NLSDA Sub-Contract somehow continued to exist, it was only as one part of the mechanism for the arriving at a net balance arising from the mutual dealings. Absent agreement between the parties, there is nothing in Rule 4.90 which would justify subjecting this mechanism to the piecemeal, element-by-element approach encompassed in multiple adjudications, particularly in circumstances where, such

as here, not all the relevant parties could be joined in to the adjudication in any event. I consider that that conclusion, to the effect that Rule 4.90 envisaged a single and final ascertainment process, is consistent with the clear words of the Rule; consistent with Lord Hoffmann's reference to "a single account" in **Stein v. Blake**; and consistent both with the earlier decision of the Court of Appeal in **MS Fashions v. BCCI** [1993] 1 Ch 425 and the subsequent decision of the House of Lords in **Secretary of State for Trade and Industry v. Frid** [2004] 2 AC 506. In none of those authorities is a piecemeal, slice-by-slice approach suggested as being in any way appropriate for the taking of the account under Rule 4.90.

70. Thirdly, there is what I perceive to be a fundamental clash between the certainty and finality envisaged by the full Rule 4.90 process and, to use the vernacular, the temporary, quick-fix solution offered by construction adjudication under the Act. How can a decision that, if challenged, is of a temporary nature only, and would relate just to an element of the chose in action, have any role in or relevance to the taking of a final account under the **Insolvency Rules**?

71. This fundamental difference of approach was highlighted by the Court of Appeal in **Bouygues (UK) Limited v. Dahl-Jensen (UK) Limited** [2000] BLR 522, the only reported case of which I am aware which considered adjudication in the context of the Insolvency Rules. In that case Dahl-Jensen were in liquidation and thus were not, as a matter of law, entitled to summary judgment in respect of an amount found due by the adjudicator. Chadwick LJ referred to **Stein v. Blake** and he said this:

"34. Lord Hoffman pointed out, at page 252 in **Stein v Blake** that the bankruptcy set-off requires an account to be taken of liabilities which at the time of the bankruptcy may be due but not yet payable, or which may be unascertained in amount or subject to contingency. Nevertheless, the insolvency code requires that the account shall be deemed to have been taken, and the sums due from one party shall be set off against the other, as at the date of insolvency order. Lord Hoffman pointed out also that it was an incident of the rule that claims and cross-claims merge and are extinguished; so that, as between the insolvent and the other party, there is only a single claim - represented by the balance of the account between them. In those circumstances it is difficult to see how a summary judgment can be of any advantage to either party where, as the 1996 Act and paragraph 31 of the Model Adjudication Procedure make clear, the account can be reopened at some stage; and has to be reopened in the insolvency of Dahl-Jensen.

35. Part 24, rule 2 of the Civil Procedure Rules enables the court to give summary judgment on the whole of a claim, or on a particular issue, if it considers that the defendant has no real prospect of successfully defending the claim and there is no other reason why the case or issue should be disposed of at a trial. In circumstances such as the present, where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in the liquidation, in which full account can be taken and a balance struck. That is what rule 4.90 of the Insolvency Rules 1986 requires."

72. In my judgment **Bouygues** highlights the fundamental discrepancy between the pursuit of the only dispute that can now arise between the parties, namely, in respect of the balance of the account between them to be identified as part of the final and certain process under Rule 4.90, and the purported reference to adjudication of a dispute in respect of one element only of that balance, pursuant to a process which can, in any event, be opened up as of right thereafter. This is a third reason why, in my judgment, Utilities have not sought to and cannot adjudicate their claim to the balance of the account arising out of the mutual dealings between the parties.

73. Miss Barwise's only answer to **Bouygues** was to say that it was of no application because Utilities were solvent and not in liquidation. But, so it seems to me, that does not get round the difficulty that the only claim that Utilities can pursue as assignees is the claim under Rule 4.90 that was previously available to TML's liquidators. Therefore the incompatibility of adjudication in this context is, in my view, an insurmountable jurisdictional hurdle to Utilities, just as it would have been to TML's liquidators."

(emphasis added)

45.
This analysis, in my judgment, is undoubtedly correct and I adopt it. Although not strictly binding upon me, I bear in mind what Lord Neuberger said in **Willers v Joyce (No.2)** [2016] UKSC 44 at [9]:

"So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so."

In this case, not only is there no such powerful reason for me to disagree with those passages from **Enterprise** that I have reproduced in [44], but on the contrary there is every reason to agree with the analysis in that case. Mr Sears sought to distinguish the authority as it involved multiple contracts, and an assignment. Those are doubtless features of the facts in that case, but they are not features that mean the analysis which I adopt is or should be different if there were only one contract, and/or no assignment. The analysis is of the nature of the character and existence of both claim and cross claim, or to use the language of both the 1986 Rules and 2016 Rules, the "mutual dealings and the sums due from" one party to the other following the taking of the account. Mutual dealings and sums due between the two parties can arise under one, or more than one, contract.

46.
Given the very close wording of both versions of the Rules, therefore, I consider that the analysis of Coulson J (as he then was) applies equally to an account under the 2016 Rules as it did to one conducted under the 1986 Rules, which was the version in force at the time of **Enterprise**.

47.
I therefore entirely agree with that particular part of the judgment in **Enterprise** where the conclusion to this part of the analysis is provided in the following terms:

"79. It follows from my analysis in Section 7 above that the adjudicator does not have the necessary jurisdiction to deal with this dispute. The only claim now extant between the parties is the claim by Utilities as assignees for the net balance under Rule 4.90. That is not a claim which could be referred to adjudication and it is not the claim that has been purportedly referred to this adjudicator. The claim which has been purportedly referred to the adjudicator no longer exists. Further, for the reasons noted above, Rule 4.90 does not contemplate that the account process would be taken in a piecemeal or slice-by-slice fashion, by reference to potentially different tribunals, including adjudicators who could, at most, make a decision that is only of temporary effect."

(emphasis added)

48.
In my judgment that is precisely what happens to claims and cross claims when a liquidator is appointed. They cease to be capable of separate enforcement upon, or at, the date of liquidation. When precisely that date is, depends upon the type of liquidation, but is provided for in the Insolvency

Act itself. Mr Sears made a number of what he termed practical points in favour of his legal submissions justifying the opposite conclusion on the issue in this case. These are that liquidators across the country regularly refer disputes to adjudication either separately to taking the account under the Insolvency Rules, as part of taking that account, or as practical steps to determine disputes between the company in liquidation and its counter-party to construction contracts. That may very well be the case; some liquidators may do that. The court can only address such disputes that come before it, and the practical behaviour of liquidators (and parties against whom companies in liquidation adjudicate, and the adjudicators themselves) cannot affect the correct legal characterisation of disputes and mutual dealings which are set down in the Insolvency Rules, which have statutory force. I would be surprised if many, or indeed any, adjudicators would decline to resign if a responding party brought the relevant passages of **Bouygues, Enterprise** or indeed this case to his or her attention during an adjudication. This case is sufficient to demonstrate that not all tribunals react the same way, however, and the practical behaviour of liquidators (and adjudicators) does not outweigh what I consider to be the correct legal analysis. Mr Sears also suggested that it might be useful to the parties to know the answer to the repudiation issue, as that would have an impact upon the taking of the account under the 2016 Rules. Again, I agree that this might be useful. If the parties wish to agree a mechanism to resolve that issue, that is up to them. Again, such a point of utility cannot affect the correct legal characterisation of what occurs to claims and cross claims upon the company being placed in liquidation. In my judgment, adjudication against the will of the party not in liquidation is not such a mechanism.

49.
Mr Sears also relied upon **Philpott v Lycee Francais Charles de Gaulle School** [2015] EWHC 1065 (Ch). In this case HHJ Purle QC (sitting as a Deputy Judge of the High Court) was asked by the liquidators of a company in voluntary liquidation to consider, in the context of cross claims under a construction contract, whether the arbitration clause applied and whether adjudication was still available. He answered both questions in the affirmative. As regards adjudication, he noted the following at [17]:

“The issue in that case [**Enterprise Managed Services v Tony McFadden Utilities Ltd** [2009] EWHC 3222 (TCC)] was whether or not adjudication was an appropriate process in the case of an assigned debt involving several contracts. We are only concerned here with one contract and there is no assignment.”

50.
He went on to state at [30] as follows:

“An issue has also been raised as to whether or not adjudication is available. It seems to me that in the particular circumstances of this case , under the terms of the contract, adjudication is an available process which it is open to the liquidators to pursue. Whether it makes any sense to invoke adjudication must be a matter of commercial judgment, because the adjudication will not, as I have said, without more, result in the ascertainment of the net balance. The adjudication will produce at most a temporary obligation, more in the nature of an interim payment. However the contractual right to an adjudication is there . Whether or not the court would enforce any order against the company seems inconceivable, as this would defeat the requirement of pari passu distribution, and it may therefore be that were the school to make an adjudication application, that might be met by an application for a stay by the liquidators on conventional insolvency grounds”

(emphasis added)

51.
With respect to the Deputy High Court Judge in that case, I consider those passages concerning adjudication where a company is in liquidation simply to be wrong. This is for the following reasons:

1. It ignores the analysis of Coulson J (as he then was) in [72] of **Enterprise** when he stated that "**Bouygues** highlights the fundamental discrepancy between the pursuit of the only dispute that can now arise between the parties, namely, in respect of the balance of the account between them to be identified as part of the final and certain process under Rule 4.90, and the purported reference to adjudication of a dispute in respect of one element only of that balance, pursuant to a process which can, in any event, be opened up as of right thereafter." This was the "third reason" relied upon by the judge in **Enterprise**, and applies regardless of how many contracts there are between the parties.

2. The presence of an assignment in the **Enterprise** case makes no difference to the analysis of the judge in that case. No assignee can be in any better position than the assignor. This is trite law. The emphasised passage in **Enterprise** in [47] of this judgment could equally state, with changes highlighted in the usual way "The only claim now extant between the parties is the claim by Utilities as assignees TML in liquidation for the net balance under Rule 4.90. That is not a claim which could be referred to adjudication and it is not the claim that has been purportedly referred to this adjudicator. The claim which has been purportedly referred to the adjudicator no longer exists." The reason that the claim "no longer exists" is because of the liquidation, not because of the assignment.

3. The statement that adjudication is an available process, but the courts will not enforce it, ignores two important elements. Firstly, it ignores the dicta by Edwards-Stuart J at [63] in **Twintec v Volker Fitzpatrick** where he stated "I am unable to see how it would be either just or convenient to permit an adjudication to continue in circumstances where the decision of the adjudicator will be incapable of enforcement." Secondly, it ignores the finding of Coulson J (as he then was) at [79] of **Enterprise** where he stated that "the adjudicator does not have the necessary jurisdiction to deal with this dispute." Jurisdiction is an absolute – a tribunal either has it, or it does not. There are not different gradations of jurisdiction. There is no "half-way house", where an adjudicator has jurisdiction to determine a dispute, but the courts will not enforce the decision. It is, by now, trite law that a decision of an adjudicator who has jurisdiction to determine the dispute referred to him or her will be enforced by the court, absent substantive breaches of natural justice that make the adjudication proceedings materially unfair.

4. The conclusion of the deputy judge also ignores the express finding at [68] in **Enterprise** that "the only chose in action" was "the claim to a net balance which arose out of the mutual dealings". If there is but one chose in action in existence, there can be no "temporary obligation, more in the nature of an interim payment" owed to a party in liquidation. No such obligation can exist, temporary or otherwise. The obligation can only exist and be in respect of that single chose in action, not something else.

5. The conclusion of the deputy judge also ignores the summary of **Enterprise** in the leading textbook in this area, namely Coulson on Construction Adjudication (2 nd ed. 2011 Oxford University Press) at 13.24. The text states "in **Enterprise v Tony McFadden Utilities** the adjudicator's decision was not enforced for a variety of jurisdictional reasons." It also states at 17.07 that "if the judgment creditor is in liquidation, then that is a ground either to refuse summary judgment, or to stay execution."

6. It also ignores Hart v Fidler [2006] EWHC 2857 (TCC) . In that case, the liquidation of the contractor was one of the reasons why the court refused to enforce the adjudicator's decision. At 17-08 in Coulson on Construction Adjudication**,** the text states that this was "one of three separate

reasons" to refuse enforcement, and that in that case the court decided that "to enter judgment in such circumstances might amount to an inaccurate assertion of the parties' substantive rights in the liquidation, because such a judgment would be based upon a decision which was only temporarily binding".

52.
The statement in **Philpott** that whether a liquidator could or should commence an adjudication is "a matter of commercial judgment" shows that the decision of the deputy judge in **Philpott** was swayed by just the sort of practical considerations prayed in aid by Mr Sears in this case. Those practical or commercial considerations do not impact upon the legal analysis of what, if any, dispute can subsist after the date of the liquidation. In order to be clear, I do not consider **Philpott** to be correct so far as it deals with adjudication, I consider it to be wrong and I decline to follow or apply the reasoning in that case.

53.
I therefore conclude that, as at the date of the liquidation, and as a direct result of what occurs upon the appointment of the liquidator and the operation of the Insolvency Rules, the disputes between Lonsdale and Bresco that consist of claims and cross-claims between them become replaced with a single debt. That is thereafter the dispute, namely the result of the account that the 2016 Rules require to be taken to determine the balance payable in which direction. The same crystallisation of this different dispute would also occur on the date of the liquidation under the 1986 Rules. The agreement of the parties that the 2016 Rules apply does not therefore have any effect upon the outcome of these proceedings. For what it is worth, in my judgment in this case this crystallisation occurred when the 1986 Rules were in force, but that does not matter.

54.
I should now turn to two other arguments relied upon by Mr Sears. The first relates to the correct legal characterisation of what occurs to the claims and cross-claims between the parties as at the appointment of the liquidator. He submitted that they could not "cease to exist", and although the same point was expressed in different elegant ways, the thrust is best summarised in Bresco's post-hearing written submissions in the following terms:

"All "close out" transactions in cases such as Lehmann and Carillion would be invalid since all close outs resulted in the exercise of contractual rights following liquidation of one party. According to the Claimant all such contractual rights (and procedures) were extinguished and all that the Liquidators could do was commence legal proceedings to decide the net balance under r.14.25."

The reference to "Lehman" refers to the collapse of the Lehman Group of companies in 2008, an event within the financial world of cataclysmic proportions that threatened the global banking system. "Carillion" refers to the sudden liquidation of a major FTSE 100 company. They are not directly comparable to one another, in that the former was an administration and the latter the appointment of PwC as Special Managers, to act on behalf of the Official Receiver. The involvement of the Official Receiver is not entirely usual, and certainly not for such a major company. However, Carillion was therefore a liquidation.

55.
The submission about the validity of "close out" transactions ignores a fundamental difference with this case, however, and that is that such transactions are not determined by an adjudicator. However, the question of whether claims and cross-claims cease to exist raises an interesting, legally existential, point. The answer to the point does not however affect the conclusion in this case. There is

also the assistance of high authority which considers the point. I referred to each of the next two authorities at the hearing in this case, but the parties did not make submissions on them. Doubtless the parties, correctly, did not consider the answer to the existential point to be determinative of the issue before me. Bresco's counsel offered to provide further oral submissions upon invitation after lodging their post-hearing written submissions, but I did not issue such an invitation for the same reason. I will however address the point in outline for completeness.

56.
In **Wight v Eckhardt Marine GmbH (Cayman Islands)** [2003] UKPC 37 the Judicial Committee of the Privy Council heard an appeal from the Court of Appeal of the Cayman Islands concerning the validity of a debt and whether it was governed not by the proper law but by the lex situs. The situs of the debt had originally been Bangladesh, but on the winding up of the debtor company (whose liabilities were transferred to a virtual state bank) it potentially became a claim to participate in the distribution of the assets by the liquidation that occurred in the Cayman Islands, where the company was incorporated, which would have the result that the situs of the claim would become the Cayman Islands. It was held by the Privy Council that a winding up order was not the equivalent of a judgment against the company, which converted a creditor's claim into something juridically different like a judgment debt. Winding up left the debts of the creditors untouched: it only affected the way in which they could be enforced. As Lord Hoffman stated at [26], winding up was a process of collective enforcement of debts. He made this further clear at [27] when he said:

"The winding up does not either create new substantive rights in the creditors or destroy the old ones. Their debts, if they are owing, remain debts throughout. They are discharged by the winding up only to the extent that they are paid out of dividends. But when the process of distribution is complete, there are no further assets against which they can be enforced. There is no equivalent of the discharge of a personal bankrupt which extinguishes his debts."

57.
In **Joint Administrators of LB Holdings Intermediate 2 Ltd v Joint Administrators of Lehman Brothers International (Europe) and others** [2017] UKSC 38 the sole function of the appellant company was to act as the immediate holding company for the first respondent company. As part of the Lehman collapse, the companies went into administration. The appellant was referred to as LBHI2, and the respondent as LBIE. The 1986 Rules were the applicable ones at the time. As stated by Lord Neuberger at [3]:

"The purpose of the administrations of these companies has been the realisation of their respective assets to best advantage, rather than the preservation of the companies as going concerns. Contrary to many people's expectations when LBIE went into administration, it now appears that it is able to repay all its external creditors in full."

58.
As a result of that, there was a surplus. One of the issues before the Supreme Court related to foreign currency creditors, and the matter of the sterling value of the debt as at the date of the administration, and the sterling value of the debt when it was paid, where the latter exceeded the former. Lord Neuberger, with whom Lord Kerr and Lord Reid agreed, considered the views of Lord Hoffman in **Wight v Eckhardt** at [97] to [112]. He described them as "no more than a broad generalisation". The point was expressed as whether a contractual claim can survive the payment in full of a proof based on that claim. This is a different way of expressing whether the legal right to the claim continues in law to exist, or is extinguished. If such a right or rights did continue to exist, the

foreign currency creditors could potentially enjoy a share of the surplus. The majority in the Supreme Court held that the contractual claim did not survive the payment in full on a proof of that claim (at [107] and [112]). This was what was called Issue 2 in the summary. Lord Sumption agreed on Issue 2, but disagreed with the analysis to which I have referred, and Lord Clarke dissented on Issue 2 altogether. This therefore means that by a majority of 3:2 the Supreme Court held that it was inconsistent with Chapter 10 of Part 2 of the 1986 Rules, and the natural meaning of rule 2.72(1), that a debt met in full nonetheless had a component that was capable of resurrection.

59.
Lord Sumption stated the following:

“195. This makes it unnecessary to determine the nature of insolvency proceedings as applied to debts in general. There are two possibilities. The first is that the statutory scheme for corporate insolvency works by discharging the creditor’s legal right and replacing it by a right to receive a distribution from the insolvent estate in accordance with the Rules. In that case, there is no continuing contractual obligation which can be said to remain partially unsatisfied once the creditor has received all that the Insolvency Rules entitle him to. The second possibility is that insolvency proceedings merely operate as an administrative procedure for distributing the debtor’s assets pari passu among its creditors when there is a deficiency, without abrogating or altering the creditor’s pre-existing legal rights save in so far as the legislative scheme so provides. As David Richards J put it (para 110) [of the first instance judgment at [2015] EWHC 704 (Ch) 1], the creditor’s contractual rights are “compromised by the insolvency regime only for the purpose of achieving justice among creditors through a pari passu distribution.” In that case, the creditor’s claims survive and remain enforceable against any surplus assets, unless the legislation otherwise provides. On the view which I take, even if this latter analysis is correct, it will not avail the LBIE creditors, since in the case of foreign currency debts the legislation does otherwise provide.

196. These fundamental questions about the nature of insolvency proceedings have arisen in the case law in a wide variety of legal contexts. It may well be necessary to answer them at some point in the future. In the meantime, I merely express the provisional view that there is much to be said for the way in which David Richards J and the majority of the Court of Appeal answered them.”

(emphasis added)

60.
I refer to these authorities to make the following points clear. Firstly, Lord Hoffman suggests the rights are not extinguished; he expressly stated that the “winding up does not either create new substantive rights …. or destroy the old ones”. A majority of the Supreme Court disagreed with that view, and Lord Neuberger stated that Lord Hoffman’s views were “no more than a broad generalisation”, but in a case concerned with the effect of an administration, concerning the 1986 Rules not the 2016 Rules, and specifically a different rule to Rule 4.90. Lord Sumption disagreed with his three fellow JSCs on this point and expressed the provisional view that the contrary point of view was to be preferred, but in obiter comments because he agreed with the majority on Issue 2. He also said that these were “fundamental questions about the nature of insolvency proceedings [which] have arisen in the case law in a wide variety of legal contexts. It may well be necessary to answer them at some point in the future.” This statement makes it clear that he did not consider such a point to have been already decided. Lord Clarke agreed with Lord Sumption.

61.

I do not need to resolve such an issue to decide this case. I trust my hesitancy in adopting this course is understandable, given the depth of judicial consideration to date, and the difference of high judicial views. It is not necessary for this reason. Whether the underlying rights “merge and are extinguished” (the terms used in [34] of **Bouygues**), or are not destroyed but “remain debts throughout” (the terms used in [27] of **Wight v Eckhardt Marine**) they are no longer, after the liquidation, capable of separate enforcement. The issue posed by Mr Sears in this respect is therefore not determinative. Whichever analysis is the correct one in legal theory, any claims Bresco has under the contract cease to be capable of separate enforcement upon the date of the liquidation. Whether some remnant of them remain, perhaps to be resurrected at a later date in very restricted circumstances, or whether they are wholly extinguished, is a matter for another day and another case. It does not arise in this case.

62.
The only dispute that remains in law is that of taking the account under the 2016 Rules (or the 1986 Rules before that). All Bresco can have is a claim to the balance following the taking of the account required by the Rules. An adjudicator cannot conduct such an account under the Insolvency Rules.

63.
In **Wilson and Sharp Investments Ltd v Harbour View Developments Ltd** [2015] EWCA Civ 1030, the Court of Appeal heard an appeal against the dismissal by the judge of an application by Wilson and Sharp (the appellant) for an injunction to restrain Harbour View from presenting a winding up petition against it based on alleged debts of £902,506. This was the balance due under four interim certificates under two different building contracts. On the relevant issue, the Court of Appeal stated the following, which Mr Sears relies upon in order to support his submissions that Bresco’s rights are not extinguished as a result of the liquidation:

“57. The second issue is whether, even on the assumption that there was no contractual entitlement under the terms of the contracts themselves to refuse payment of interim certificates, the judge should nonetheless have restrained presentation of the petition based on the interim certificates in accordance with what Miss Lee submitted was the established practice of the TCC not to enforce interim payment obligations in favour of insolvent contractors. She submitted that the judge, in permitting the respondent to present a petition, acted inconsistently with the established practice of the TCC, which recognised the provisional nature of interim payment obligations, and that enforcement should not be ordered where there was no prospect of recovering payment if those payment obligations were subsequently varied. In this context she referred to: Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd at pages 527-529, paragraphs 29 to 36; Hart v Fidler [2006] EWHC 2857 (TCC) at paragraphs 69-73; and Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC) at paragraph 22.

58. Those cases indeed establish (as, for example, the above citation from paragraphs 29 to 36 of the judgment of Chadwick LJ in Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd demonstrates) that, in appropriate circumstances, including where the contractor is insolvent, the provisional nature of an employer's obligation to make payment of an interim payment will lead to the court refusing summary judgment on an adjudication in favour of the contractor.

59. But, in my judgment, it is clear from the facts of, and discussion in, those cases that it is not an absolute rule that summary judgment on an adjudication will be refused simply because the employer is able to show by evidence that the contractor is insolvent. What is clear is that, in deciding whether to refuse summary judgment in such cases, the court looks at all the circumstances including whether

the employer's counterclaim has sufficient merit to justify such a course and/or has sufficient mutuality to lead to compulsory set off in an insolvency.

60. Thus, in my judgment, in the absence of a contractual right entitling the employer to refuse payment under interim certificates in the event of the insolvency of the contractor (such as I have held existed under the contracts in the present case), there is no absolute rule that the TCC will necessarily decline to give summary judgment or restrain presentation of a winding up petition based on an adjudication, merely because the contractor is insolvent. Whether or not the court will adopt such a course will be dependent on the facts of the particular case. Accordingly, I would dismiss the appeal on this ground."

(emphasis added)

64.
These statements of the Court of Appeal (Gloster LJ, with whom McCombe LJ and Sir Colin Rimer agreed) were made in relation to a situation where the appellant sought to restrain the presentation of a winding up petition. They were also made in respect of a company that was insolvent and in creditors' voluntary liquidation. However, it is clear that in the passages above Gloster LJ was dealing with insolvency generally, and not specifically liquidation. This is made clear by [8] which states:

"Clause 8.5 of the Conditions dealt with the insolvency of the contractor. The relevant provisions will be set out in full below. It is the appellant's contention that the effect of clauses 8.1.3, 8.5.3, 8.5.3.1 and 8.7.3 was that, as from the date that the contractor passed a resolution for voluntary winding-up without a declaration of solvency, the employer was no longer under any obligation to pay any sum that had already become due and payable under any interim payment certificate".

65.
This makes clear that the sums included in the interim payment certificates had already fallen due. The relevant finding is at [60] in these terms: "there is no absolute rule that the TCC will necessarily decline to give summary judgment or restrain presentation of a winding up petition based on an adjudication, merely because the contractor is insolvent. Whether or not the court will adopt such a course will be dependent on the facts of the particular case." If in any particular case a company was in insolvent liquidation, and a liquidator had been appointed, the 2016 Rules would apply and the matter does not become one of TCC practice. There is no analysis in **Wilson and Sharp** upon the nature of the continuing existence, or otherwise, of the claims and cross claims which fall to be considered as part of taking the account in circumstances of liquidation, rather than insolvency more generally. Further, restraining presentation of a winding up petition is rather different. In the instant case, the liquidation has already occurred. This case does not therefore assist Mr Sears in my judgment.

66.
The second argument relates to his submission that, were I to find for Lonsdale, this would contravene the right of a party to a construction contract to adjudicate at any time. Section 108 of the 1996 Act states:

"A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section".

Similar wording appears in paragraph 1(1) of the Scheme thus:

“Any party to a construction contract (the ‘referring party’) may give written notice (the ‘notice of adjudication’) of his intention to refer any dispute under the contract, to adjudication”.

67.
The phrase “a dispute arising under the contract” in the Act, or “any dispute under the contract” in the Scheme both include the important words “under the contract”. Upon the appointment of the liquidator, any number of disputes between the parties to a construction contract, becomes a single one, namely a dispute relating to the account under the Insolvency Rules. It becomes a claim for the net balance under Rule 14.25(2) of the 2016 Rules. Before they came into force, it would have been a “claim….. for the net balance under Rule 4.90” of the 1986 Rules as stated in [79] of **Enterprise.** This analysis makes it clear that this is the only claim that can exist. I do not consider such a dispute in relation to the taking of an Insolvency Rules’ account to be “a dispute arising under the contract” to use the wording in the Act, or “any dispute under the contract” to use the wording of the Scheme. It is a dispute arising in the liquidation. I do not consider that Parliament, in enacting both the Housing Grants Construction and Regeneration Act 1996 and its successors, has given adjudicators the power to resolve disputes in the taking of the account required by the Insolvency Rules, either the 1986 Rules or the 2016 Rules. Clear words in the statute would be required to impose such a change on the law of insolvency. Further, the 1996 Act post-dates the Insolvency Act 1986 by a decade. Primary legislation is presumed to be consistent with, and is to be construed in accordance with, existing primary legislation. There is nothing included in any of the statutes that deal with adjudication in construction contracts to suggest such a sweeping change was imposed, or even contemplated.

68.
Finally in terms of authorities, I take comfort that my analysis is consistent with other authority which touches upon some of the same issues. In **Melville Dundas Ltd (in receivership) v George Wimpey UK Ltd** [2007] UKHL 18 the House of Lords considered an appeal in a Scottish case. Strictly speaking the ratio is persuasive not binding, because Scottish law is different in some respects from the law of England and Wales. That case also concerned interim payments and dates for withholding notices, and not the jurisdiction of an adjudicator in circumstances such as those in the instant case. But in **Melville Dundas**, the House of Lords addressed the purpose of the 1996 Act, what if any applicability it had in respect of insolvency, and also approved the dicta to which I have referred in **Bouygues.**

69.
At [11], Lord Hoffman stated:

“Upon insolvency, liability to make an interim payment therefore becomes a matter which relates not to cash flow but to the substantive rights of the employer on the one hand and the contractor's secured or unsecured creditors on the other.

12. The Inner House ([2006] SLT 95) in holding that clause 27.6.5.1 was in conflict with the terms of the 1996 Act, said (at p. 104) that if a contractor became insolvent, Parliament "has provided quite clearly that…the losses should be borne by the…employers under the contract." My Lords, I can find no trace of such an intention. It seems to me most unlikely that Parliament intended that provisions intended to improve the efficiency of the construction industry should determine priorities between the employer and an insolvent contractor's creditors. The Inner House added that not only would there be bankers with an interest in the [insolvent] contractor's cash flow but "there will be subcontractors awaiting payment". This seems to be based upon some misapprehension, because in most cases the position of subcontractors would be in no way improved by construing the Act as

disabling an employer from retaining the money which provides him with security for his cross-claim. If he is made to pay, the money will go to the bank and neither the contractor nor the subcontractors will get anything.

13. A provision such as clause 27.6.5.1, which gives the employer a limited right to retain funds by way of security for his cross-claims, seems to me a reasonable compromise between discouraging employers from retaining interim payments against the possibility that a contractor who is performing the contract might become insolvent at some future date (which may well be self-fulfilling) and allowing the interim payment system to be used for a purpose for which it was never intended, namely to improve the position of an insolvent contractor's secured or unsecured creditors against the employer. Mr Howie said that to allow the employer any security in the form of an unpaid instalment payment would be to allow him to profit from his own wrong. But the security arises, not from the terms of the contract but from the law of bankruptcy set-off. As Chadwick LJ pointed out in Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] BLR 522 , any creditor who owes a debt to an insolvent company, no matter how long overdue, may set off that debt in full against his own claim in the liquidation."

(emphasis added)

70.
Lord Hope stated the following at [32], in respect of what occurs when a winding up order is made:

"This is known as compensation, or the balancing of accounts, in bankruptcy. Its purpose is to prevent the hardship of a debtor who is also a creditor being forced to pay in full, when he will come in only as a creditor for a dividend for his debt as a result of ranking pari passu with the ordinary creditors. The liquidation of a company is treated as the equivalent for this purpose as bankruptcy: Highland Engineering Ltd v Thomson, 1972 SC 87, 91, per Lord Fraser. The parties to a construction contract are entitled to the benefit of the doctrine, just like anyone else. The same result is achieved under English law by rule 4.90 of the Insolvency Rules 1986: see Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] BLR 522 , paras 30-32 per Chadwick LJ, although the point was not taken in that case.

33. The doctrine is available only in the event of liquidation or bankruptcy. As Bell puts it in his Commentaries [Commentaries on the Law of Scotland] vol ii, 122, the imminent necessity for the payment of the liquid debt is taken away by the bankruptcy. But there are other situations closely related to insolvency, listed in clause 27.3.1, where the employer may have good reasons for wishing to determine the contractor's employment. There may also be good reasons in those situations for thinking that the contractor, although not yet actually insolvent, is on the verge of insolvency. JCT 1998 seeks, in the employer's interest, to deal with this situation in two ways."

(emphasis added)

71.
[33] to [35] deal with the contractual mechanism, which is not relevant here, but the speech continues at [36] with consideration of the process that led to the passing of the 1996 Act:

"36. Part II of the 1996 Act contains a package of measures relating to construction contracts which followed upon the recommendations of Sir Michael Latham's Report Constructing the Team (HMSO 1994). His report was jointly funded by the construction industry and the Department of the Environment. In May 1995 the Department of the Environment issued a consultation paper entitled Fair Construction Contracts. It was concerned with the extent to which improved construction

contracts could and should be underpinned in law: para 2. It was noted that the Latham Report had confirmed what was widely believed, that the existing arrangements militated against co-operation and teamwork, and that the reform of current contractual relations was central to the competitiveness of the industry in both the short and long term: para 4, 5. Attention was drawn to the list of principles that Constructing the Team had identified in para 5.18 as those which the most effective form of contract in modern conditions should include. Among these principles, which were set out in Annex A to the consultation paper, was the following:

"9. Clearly setting out the period within which interim payments must be made to all participants in the process, failing which they will have an automatic right to compensation, involving payment of interest at a sufficiently heavy rate to deter slow payment."

None of the principles listed here deals with the situation referred to in the proviso to clause 27.6.5.1.

37. In para 23 of the consultation paper it was noted that the proposals in Constructing the Team had identified the following as essential terms in all construction contracts: dispute resolution; right of set off; prompt payment; protection against insolvency. In para 12 it was noted that legislation in this area could significantly restrict to some extent the freedom of parties to contract on any terms they chose. The first point on which the government wished to have views was whether the proposals for legislation set out in Constructing the Team and elaborated in the consultation paper were likely to improve contractual relations sufficiently to justify this regulatory intervention. So it is important to see what the consultation paper does, and does not, address.

38. The section of the consultation paper which deals with prompt payment refers to payments that fall to be made during the course of the project, and to the need for a clearly defined period within which interim payments must be made to all participants in the process: paras 34, 35. In para 38 it was suggested that the practice of withholding payment until payment had been received from a party higher up the chain ought not to be recognised in any statutory scheme for the approval of a standard from of building contract. The section on the right of set off refers to the widely applied practice of setting off unliquidated cross claims against sums due on interim certificates: see Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd [1974] AC 689. Constructing the Team recommended that this right should be constrained: para 8.9. The consultation paper proposed various steps that might be taken to deal with this problem: paras 31, 32. But set-off in the circumstances referred to in clause 27.6.5.1 is not discussed. There is no indication that there was thought to be any need to constrain, or to restrict, the employer's right of set off in the event of the determination of the contractor's employment under the contract.

39. In the section of the consultation paper on protection against insolvency it was noted that a complication in creating trust among the members of the construction team which had attracted particular attention was the fear that during the course of the contract one of the parties, including the client, might become insolvent: para 39. In para 40 the consultation paper stated that it was not possible to give absolute protection against this risk which was a normal commercial one faced by all those doing business. It was suggested that the risk could be minimised, in the case of the client, by the use of trust funds. But there is no indication here that it was the intention to reduce the protection that it was already the practice for the employer to seek to obtain against the risk of the contractor's insolvency in the event of the determination of his employment under the contract.

40. That then is the background to Part II of the 1996 Act. In general its provisions follow the agenda that was indicated in the consultation paper. Legislation on trust funds to increase protection against the client's insolvency was omitted, as was the provision of a statutory right to interest for late

payment. But provision was made for entitlement to stage payments (section 109), for the inclusion in every construction contract of an adequate mechanism for determining what payments become due under it and the final date for payment in relation to any sum which becomes due (section 110), for notice to be given of an intention to withhold payment (section 111), for a right to suspend performance for non-payment (section 112) and for the prohibition of provisions making payment conditional on payment received from a third person (section 113). Leaving aside the small print, there is nothing in this part of the Act that would surprise anyone who had engaged in the consultation process that preceded it. Nor is there anything to suggest that regulatory intervention had been resorted to on matters that had not been put out for consultation with the construction industry".

72.
At [78] Lord Neuberger stated:

"Once a contractor becomes insolvent, there is at any rate in English law, and as I understand it in Scots law, an automatic set off arrangement (see rule 4.90 of the Insolvency Rule 1986 as discussed in Stein v Blake [1996] AC 243 and, in the context of a case such as this, in Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] BLR 522 paras 29-34). Accordingly, the importance given by the legislature to cash flow for contractors and subcontractors in sections 109 to 111 effectively gives way to the importance of rights of creditors once there is an insolvency."

73.
These passages, which I have quoted extensively in order to demonstrate the context in which **Bouygues** was expressly approved, make it clear that the doctrine of bankruptcy set off (at that date under the 1986 Rules, not the 2016 Rules) was not undermined, changed or watered down by the passing of the 1996 Act. That means that Lonsdale, under either version of the Insolvency Rules, is entitled to the benefit of that doctrine. That then has the consequence that there is but a single claim now in existence so far as enforcement by either party is concerned. How much that is, and in which direction, must be – indeed, can only be - ascertained after taking the account of the mutual dealings of Lonsdale and Bresco required by the Insolvency Rules.

74.
Accordingly, I do not consider that the conclusions in this case in respect of a company in liquidation undermine, or are contrary to, the primary legislation that has enshrined adjudication as a mandatory dispute resolution procedure in construction contracts.

75.
This outcome does not depend upon which version of the Insolvency Rules is the applicable one in this case. Given the effect of the Insolvency Rules upon the mutual claims and cross claims occurs as at the date of the liquidation, the nature of this could not, it seems to me, retrospectively change when at a later date a different version of the Rules was produced and came into force. However, given that I have concluded that both the 1986 Rules and the 2016 Rules have the same effect in this respect, it does not matter either that the liquidator was appointed prior to the 2016 Rules coming into force, or that the parties have agreed that the 2016 Rules apply to the issues before the court in these proceedings. The same analysis would apply if the liquidator had been appointed after 6 April 2017.

76.
This therefore means that the adjudicator in this case does not have jurisdiction to determine the dispute referred to him. The dispute referred to him included both money claims and cross claims,

and an analysis of how much was owed to Bresco. The answer to the issue that I framed at [22] above is as follows:

A company in liquidation cannot refer a dispute to adjudication when that dispute includes (whether in whole or in part) determination of any claim for further sums said to be due to the referring party from the responding party.

77.
Accordingly, the necessary declarations will be granted in these Part 8 proceedings, and the adjudication will not be allowed to continue. I will hear from counsel in terms of the precise terms of the order necessary.