



Deemed utility contracts and IP expenses - Peacocks provides rich plumage

The practice of energy companies in insolvency situations has long been a cause for frustration: in most cases the supplier will terminate the existing supply contract and a new - deemed - statutory contract at much higher rates will then apply. In the Peacocks decision ((1) *Christine Mary Laverty* (2) *Edward George Boyle* (3) *Jonathan Scott Pope* (Joint Liquidators Of PGL Realisations Plc, Pstores Realisations Ltd & Dorsman Estates Co Ltd) v *British Gas Trading Ltd* [2014] EWHC 2721 (Ch)), the High Court sheds some much-needed light on the situation, in particular on liability for supplies to vacated premises.

The background

The Peacocks Group entered administration on 19 January 2012, and had operated a chain of clothing stores. After the group entered administration, British Gas served notices on the group companies, terminating the gas and electricity supply contracts. British Gas continued to supply the group under the terms of the Gas Act 1986 and Electricity Act 1989, under contracts which were deemed to have arisen on the termination of fixed term written contracts. These deemed contracts were at significantly higher rates.

Eventually, on 22 February a large number of stores were sold to third parties, and the administrators ceased to trade from the remaining 176 stores during February and March, and those stores were vacated, no further use of them being made by the administrators or the group companies. The group subsequently moved to creditors voluntary winding up.

The issues - administration expenses

The liquidators (who were the previous administrators) did not dispute that supplies of gas and electricity to the stores during the period of trading (totalling some £1.38 million) constituted an expense of the administration, and that amount was settled.

However, they did dispute that the supplies under the deemed contracts after the premises were vacated (some £1.2 million) were administration expenses, and asked the court to decide (i) whether such supplies constituted an administration expense and (ii) whether such supplies were provable debts.

What did the court decide?

The court decided that the post-vacation supplies were not administration expenses. In reaching that conclusion the court placed particular emphasis on the following factors:

- (i) There was a clear distinction between an express contract and a deemed one. A deemed contract did not contain all the terms and conditions of the agreement, and did not come into existence through any conscious act of the administrators. Instead, the terms and conditions were imposed.
- (ii) Nothing in the legislation indicated whether the mere act of the supplier continuing to make supplies entitled it to be ranked above other creditors.
- (iii) The deemed contract only arose on the supplier's termination of the previous express contract, and it was not clear when the customer could bring the deemed contract to an end (if at all). Additionally, termination of the previous express contract was at the supplier's instigation, upon the occurrence of certain customer insolvency events.
- (iv) The ability of a supplier to request a personal guarantee of the office holder under s.233 of the Insolvency Act 1986 - whilst not conclusive - weighed against the charges under a deemed contract gaining preferential treatment.
- (v) Charges under deemed contracts did however constitute a provable unsecured debt as a future or contingent liability, as the group was - prior to administration - "vulnerable to the specific liability" for the purpose of Insolvency Rule 13(12)(1)(b).

What does this mean for practitioners?

The decision is welcome clarification on the issue of liability for energy supplies, particularly where premises are vacated. This puts energy companies on substantially the same footing (section 233 of the Act aside) as landlords of insolvent business in the wake of the Supreme Court decision in *Pillar Denton Ltd and others v Jervis and others* [2014] EWCA Civ 180.

continued overleaf

In terms of future movements in this area, it will be interesting to see how this progresses in light of the [announcement](#) made by Business Minister Jo Swinson on 8 June, launching a consultation on safeguarding business recovery, one part of which deals with preventing energy and IT suppliers (in

particular) from terminating supplies and imposing increased charges on insolvency. The consultation, which follows lobbying from R3 under its *"Holding Rescue To Ransom"* campaign, can be found [here](#).

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