

International Corporate Rescue



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CASE REVIEW SECTION

Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd; Cannon Corporate Limited v Primus Build Limited **[2019] EWCA Civ 27**

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Synopsis

These joined appeals considered the relationship between the construction adjudication process and the insolvency regime. It was held that a contractual right to refer a claim to adjudication is not altered by the entry of one of the parties into insolvency proceedings. However, if the decision of the adjudicator is unlikely to be enforced as a result of the insolvency proceedings, the court may, in its discretion, prevent the adjudication from continuing. Whether or not an adjudication is likely to be enforced will depend on the facts: whereas a claim is likely to be futile if one of the parties is in insolvent liquidation, the position may be different if the insolvency proceedings designed to restore the company to financial health, such as a CVA. More generally, any objection to the jurisdiction of an adjudicator needs to be made promptly and clearly, otherwise the party will be taken to have waived the right to object.

Introduction

The tension in these conjoined appeals was between contractual rights and the insolvency regime. In both cases, the parties had the right to refer any dispute to adjudication. This right arose both out of the bilateral contracts themselves, and from section 108 of the Housing Grants, Construction and Regeneration Act 1996 ('the 1996 Act'), which provides that 'a party to a construction contract has the right to refer a dispute arising out of the contract for adjudication.'

The question in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* was whether an adjudicator had jurisdiction to hear a claim brought by a company in insolvent liquidation, and even if they did, whether there was any practical utility in allowing the adjudication to continue. In *Cannon Corporate Limited v Primus Build Limited*, the facts were slightly different, as Primus Build Limited ('Primus') had already obtained summary judgment against Cannon Corporate Limited ('Cannon') in respect of certain adjudications. It was not in insolvent liquidation, but had

entered into a CVA with its creditors. In order to resolve the tension, the Court adopted a pragmatic approach, holding that although any contractual rights were not extinguished by the entry of either party into an insolvency process, there may be circumstances in which the Court can, and should, prohibit the adjudication from continuing on grounds of utility. Accordingly, parties should be mindful not just of their theoretical contractual rights, but also of the practical implications of bringing or continuing the adjudication in the circumstances.

In respect of *Cannon v Primus*, the Court undertook a detailed consideration of the circumstances in which a party may be said to have waived any objection to the jurisdiction of an adjudicator. In summary, unless a reservation of rights is clearly made, the party will be taken to have waived the right to object.

Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd

This case required the Court to consider whether or not an adjudication process started by a company in insolvent liquidation could or should be permitted to continue. Bresco Electrical Services Ltd ('Bresco') sought to commence an adjudication process in relation to a dispute with Michael J Lonsdale (Electrical) Ltd ('Lonsdale') arising out of a building contract. Bresco sought to commence the adjudication in June 2018, over three years after it entered insolvent liquidation in March 2015. At first instance, the court granted Lonsdale an injunction against the continuation of the adjudication, on the ground that the adjudicator had no jurisdiction to hear the claim. The Court of Appeal upheld the injunction, but for different reasons.

In particular, the Court considered other dispute resolution procedures that would have been open to Bresco, including Court proceedings and arbitration. The fundamental difference between those procedures and adjudication is that they would result in a final determination of the issues, whereas any decision arising from an adjudication would only be temporarily binding. On this basis, it was difficult to see how the

particular characteristics of adjudication as a process could operate to deprive the adjudicator of jurisdiction to hear the claim.

However, given that Bresco was in insolvent liquidation, any temporary decision made by the adjudicator was unlikely to be enforceable, as it would contravene the *pari passu* principle. Accordingly, although the right to refer disputes to adjudication remained extant, that right was in fact devoid of any practical utility. In these circumstances, and mindful that it is undesirable to spend time and money on a process that will inevitably be futile, the Court of Appeal upheld the injunction granted by the lower court.

Cannon Corporate Limited v Primus Build Limited

In July 2017, Primus entered into a CVA, which anticipated that all of its creditors would ultimately be paid 100p in the £. The basis for this analysis was that Primus anticipated making significant recoveries against various counterparties. One of those counterparties was Cannon. There were a number of adjudication procedures to determine disputes between Canon and Primus, which culminated in Primus obtaining summary judgment in respect of the adjudication decisions against Canon in the sum of £2.1 million, and Canon failing to obtain a stay of execution. After the hearing, but prior to judgment being handed down by the Court of Appeal, the parties in fact reached a settlement, which resulted in Canon paying that sum to Primus. The Court of Appeal decided to hand down its judgment in any event.

Mirroring the submissions made in *Bresco v Lonsdale*, on appeal Canon sought to argue that the adjudicator did not have jurisdiction to hear the claim. This argument was rejected in any event, but the court also spent some time considering whether or not Canon had already waived any right to object on the grounds of jurisdiction.

The principles regarding waiver were helpfully set out by Lord Justice Coulson at [91] and [92], as follows:

‘In my view, the purpose of the 1996 Act would be substantially defeated if a responding party could, as a matter of course, reserve its position on jurisdiction in general terms at the start of an adjudication, thereby avoiding any ruling by the adjudicator or the taking of any remedial steps by the referring party; participate fully in the nuts and bolts of the adjudication, either without raising any detailed jurisdiction points, or raising only specific points which were subsequently rejected by the adjudicator (and the court); and then, having lost the adjudication, was allowed to comb through the documents in the hope that a new jurisdiction point might turn up at the summary judgment stage, in order to defeat the enforcement of the adjudicator’s decision at the

eleventh hour. To that extent, therefore, I consider that the position in adjudication is rather different to that in arbitration...

In my view, informed by that starting-point, the applicable principles on waiver and general reservations in the adjudication context are as follows:

- i) If the responding party wishes to challenge the jurisdiction of the adjudicator then it must do so ‘appropriately and clearly’. If it does not reserve its position effectively and participates in the adjudication, it will be taken to have waived any jurisdictional objection and will be unable to avoid enforcement on jurisdictional grounds ...
- ii) It will always be better for a party to reserve its position based on a specific objection or objections: otherwise the adjudicator cannot investigate the point and, if appropriate, decide not to proceed, and the referring party cannot decide for itself whether the objection has merit ...
- iii) If the specific jurisdictional objections are rejected by the adjudicator (and the court, if the objections are renewed on enforcement), then the objector will be subsequently precluded from raising other jurisdictional grounds which might otherwise have been available to it ...
- iv) A general reservation of position on jurisdiction is undesirable but may be effective ...

Much will turn on the wording of the reservation in each case. However, a general reservation may not be effective if:

- i) At the time it was provided, the objector knew or should have known of specific grounds for a jurisdictional objection but failed to articulate them ...;
- ii) The court concludes that the general reservation was worded in that way simply to try and ensure that all options (including ones not yet even thought of) could be kept open ...’

As Canon had not effectively reserved its position, it would not have been able to object on jurisdictional grounds in any event. In any case, the analysis regarding Bresco was equally applicable here, and as such the adjudicator did have jurisdiction to hear the claim.

Ultimately, the key difference between this *Canon v Primus* and *Bresco v Lonsdale* was the insolvency process in question. In *Canon v Primus* the purpose of the CVA was to restore Primus to financial health. Unlike in an insolvent liquidation, the quick resolution offered by adjudication was ideal for this situation, and any award made would not be futile. In this case, therefore, it was appropriate that summary judgment had been granted, and that the stay of execution had been refused.

Conclusion

The practical takeaways from these cases are as follows.

Firstly, it is unwise for a company in any insolvency proceeding that is designed to facilitate the distribution of its assets to commence an adjudication, since the court is likely to prohibit it from continuing. On the other hand, if the insolvency proceedings are designed to restore the company's financial health, it may be both pragmatic and desirable to commence adjudication.

Secondly, parties wishing to object to an adjudication on jurisdictional grounds should do so clearly and specifically, otherwise they will be taken to have waived any objection by participating in the process. At the time of writing, this part of the decision has been relied on in two subsequent High Court decisions, *Donald Install Associates Limited v Kew Holdings Limited* [2019] EWHC 384 (TCC) at [39], and *Ove Arup & Partners International Limited v Coleman Bennett International Consultancy Plc* [2019] EWHC 413 (TCC) at [18].

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