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Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Dispatch

Adjudication: insolvent companies

Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd
[2019] EWCA Civ 27

In Issue 219, we reported on the *Bresco* case, which deals with the interplay between the adjudication process and the insolvency regime. Here the CA had to consider the issue of whether an adjudicator can ever have the jurisdiction to deal with a claim by a company in insolvent liquidation. But, as LJ Coulson noted, there was also a related issue, concerning whether (assuming that the adjudicator had the necessary jurisdiction) such an adjudication could ever have any utility and, if not, whether an injunction preventing the continuation of what would be a futile exercise was justified in any event. Here, over three years after going into liquidation, Bresco started an adjudication, saying that Lonsdale had wrongfully repudiated a sub-sub-contract and made claims for some £220k. Mr Justice Fraser granted a declaration that:

"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 respondent party."

Bresco appealed. Lonsdale had said that the right to refer a dispute to adjudication had been lost when Bresco went into liquidation. At that point, there ceased to be any claim under the contract, because it was replaced with the single right, under Rule 14.25 of the Insolvency Rules, to claim the balance (if any), arising out of the mutual dealings and set-off between the parties. Bresco questioned why adjudication should be treated any differently to arbitration? If a party, could refer a claim to arbitration, why not to adjudication? LJ Coulson agreed that he could see no reason why, purely as a matter of jurisdiction (as opposed to utility), a reference to adjudication should be treated any differently to a reference to arbitration. If the contractual right to refer the claim to arbitration is not extinguished by the liquidation, then the underlying claim must continue to exist. That a reference to adjudication may not result in a final, binding decision could not mean that the underlying claim was somehow extinguished.

The reference to "utility" led to consideration of a second issue. What is the utility (if any) to be derived from the adjudicator's theoretical jurisdiction, when the claiming company is in insolvent liquidation and the responding party has a cross-claim? LJ Coulson referred to the "basic incompatibility between adjudication and the insolvency regime. Adjudication is a method of obtaining an improved cash flow quickly and cheaply; the insolvency regime is "an abstract accounting exercise, principally designed to assist the liquidators in recovering assets in order to pay a dividend to creditors". Reviewing the existing authorities, the Judge noted that a decision of an adjudicator in favour of a company in liquidation, like Bresco, would not ordinarily be enforced by the court. Judgment in favour of a company in insolvent liquidation (and no stay), in circumstances where there was a cross-claim, would only be granted in an "exceptional" case:

"a reference to adjudication of a claim by a contractor in insolvent liquidation, in circumstances where there is a cross-claim, would be incapable of enforcement and therefore "an exercise in futility".

It would only be in exceptional circumstances that a company in insolvent liquidation (and facing a cross-claim) could refer a claim to adjudication, succeed in that adjudication, obtain summary judgment and avoid a stay of execution. Thus, in the ordinary case, even though the adjudicator may technically have the necessary jurisdiction, it was not a jurisdiction that could lead to a meaningful result.

There was nothing on the facts of the Bresco case that took the case out of the ordinary, or which demonstrated that it was just or convenient for the underlying adjudication to continue. Bresco had been in insolvent liquidation for over three years before they referred their claim to adjudication. There was no evidence that Bresco would ever be able to trade again. By the time Bresco made their claim, they had already been sent a copy of Lonsdale's own claim, making this a classic case of claim and cross-claim. Lonsdale had not pursued Bresco, doubtless because of Bresco's insolvency. There was no good reason to make Lonsdale now incur the costs of defending a claim in adjudication which could not be enforced. Accordingly, although LJ Coulson considered that Mr Justice Fraser was wrong to find that the adjudicator had no jurisdiction to consider this claim, he agreed that Lonsdale were entitled to an injunction to prevent the adjudication continuing. In other words, whilst in theory, it is possible for companies in liquidation to start an adjudication, it may well be the case that there will be good grounds to obtain an injunction to restrain or stop that adjudication.

Adjudication: CVAs and reserving the right to make a jurisdictional challenge

Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd & (1838) Cannon Corporate Ltd v Primus Build Ltd
[2019] EWCA Civ 27

The *Cannon* case was heard at the same time as the Bresco appeal, although if searching for it, the case will be found under the *Bresco* name and reference. Here, there was a lengthy procedural history culminating in Cannon resisting summary judgment of an adjudication decision on the basis that Primus might not be able to repay the sums, because Primus was in a CVA. The Judge at first instance said:

"On any view if Primus was to make all or most of its recovery it will emerge solvent with all debtors paid and something left over, and that was the basis for having the CVA to enable it to do so."

As LJ Coulson said, this was a very different case to the situation where the claiming company was in insolvent liquidation and a liquidator was engaged to recover what he could in order to make a distribution to creditors. Here, not only was the CVA designed to allow Primus to trade out of its difficulties but, ultimately, Primus would avoid liquidation altogether. The key issue was whether Primus' financial position was due, either wholly or in significant part, to Cannon's repudiation and failure to pay the relevant sums. It was, and the Judge at first instance did not grant a stay. A CVA is designed to try and allow the company to trade its way out of trouble. In those circumstances, LJ Coulson thought that the "*quick and cost-neutral mechanism*" of adjudication may help permit the CVA to work. Accordingly, courts should be wary of reaching any conclusions which prevent a company from endeavouring to use adjudication to trade out of its difficulties. That is what adjudication is there for: to provide a quick and cheap method of improving cash flow: a different approach to where a company is in liquidation.

However, there was another issue which the CA considered. This was whether or not Cannon had waived or lost the right to make the argument that the adjudicator did not have jurisdiction to make a claim against the party in the CVA. LJ Coulson restated the applicable principles on waiver and general reservations in the adjudication context:

"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 (Allied P&L).
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 (GPS Marine).
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 (GPS Marine).
iv) A general reservation of position on jurisdiction is undesirable but may be effective (GPS Marine; Aedifice).
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 (Aedifice, CN Associates);
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 (Equitix)."

Here, Cannon's solicitors emailed the adjudicator on 17 March 2018, noting that: *"the Responding Party (Cannon) reserves its right to raise any jurisdictional and/or other issues, in due course, whether previously raised or not and whether within the forum of adjudication or other proceedings".* The Judge said that this reservation was:

"so vague - perhaps deliberately so - as to be ineffective."

The Judge thought that it appeared to suggest that Cannon might wait before unleashing a jurisdictional objection in "*other proceedings*", namely after the adjudication and at the enforcement stage. LJ Coulson was clear that this was just the sort of approach to adjudication that the courts: "*should be vigilant to discourage*". At no point did Cannon raise the argument that the adjudicator did not have the necessary jurisdiction because Primus were the subject of a CVA, nor did they before the Judge at first instance. On appeal, Cannon sought to raise a specific jurisdiction point for the first time. This was refused because the point had not been the subject of any specific reservation (despite the fact that Cannon knew or should have known about the point) and the general reservation did not cover it and was subsumed by the specific objections that followed.

Adjudication:

Barry M Cosmetics Ltd v Merit Holdings Ltd

[2019] EWHC 136 (TCC)

This was an adjudication enforcement case. Merit presented its final account on 20 December 2017 some nine months after practical completion. Barry commenced adjudication proceedings on 27 July 2018. Merit said that there was no dispute because there was not yet any entitlement to payment. The Judge disagreed. There was nothing in the language of the Scheme to suggest that a dispute may only be referred to adjudication once an entitlement to payment has arisen. Here, there was a clear dispute between the parties as to the correct value of the final account and it was entirely appropriate to refer the matter to adjudication.

Merit also raised a natural justice point. Merit had served a delay analysis as part of their Response. Barry said that this was the first time they had had any real explanation of Merit's EOT claims. Barry served their own report by way of Reply. Barry said that Merit's report had: "*ignored what actually happened on site at the time*" and was based on "theoretical events". Barry had conducted a: "*retrospective analysis, looking back at what actually happened and what actually delayed the completion of the works*". The adjudicator allowed Merit to serve a Rejoinder but limited it to 12 pages and to dealing with issues they felt that Barry had tried to "fudge". Merit objected to the direction that the Rejoinder be limited, complaining that there was too much ground to cover. Merit duly served a Rejoinder which went beyond the adjudicator's direction and a brief Surrejoinder was allowed. The Decision noted that the adjudicator had considered all the submissions and he had a preference for Barry's delay report. The Judge noted that the need to give each party an opportunity to meet the case made against him is not an unlimited right. Taken literally it might be understood to afford a right to endless rounds of pleadings. The adjudicator's direction that the Rejoinder be limited was perfectly fair and proper, and any award based on a limited rejoinder would have been in accordance with the principles of natural justice. As it was, Merit had ignored the direction; but the adjudicator had taken Merit's Rejoinder into account in arriving at his decision.

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