All England Reporter/2019/February/*Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd; Cannon Corporate Ltd v Primus Build Ltd - [2019] All ER (D) 14 (Feb)

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*Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd; Cannon Corporate Ltd v Primus Build Ltd

[2019] EWCA Civ 27

Court of Appeal, Civil Division

Sir Andrew McFarlane P, King and Coulson LJJ

24 January 2019

Building contract – Adjudication – Insolvency

Abstract

Building contract – Adjudication. Given that the appellant, Bresco had been in liquidation for three years by the time of its reference to adjudication, and that the respondent Lonsdale had a cross-claim, it was neither just nor convenient for the adjudication brought by Bresco to continue. Accordingly, the Court of Appeal, Civil Division, dismissed Bresco's appeal. The court also gave guidance on the interplay between the construction adjudication process and the insolvency regime.

Digest

The judgment is available at: [2019] EWCA Civ 27

Background

The two conjoined appeals raised important issues as to the interplay between the construction adjudication process and the insolvency regime.

In the first appeal, the appellant (Bresco) entered into a sub-sub-contract with the respondent (Lonsdale) to perform electrical installation works. Bresco became insolvent and entered into voluntary liquidation. As a result, the sub-sub-contract was terminated. Three years after the liquidation, Bresco served an adjudication notice on Lonsdale, claiming, among other things, that it had wrongfully repudiated the sub-sub-contract. Lonsdale asked the adjudicator to discontinue the adjudication on the basis that he had no jurisdiction because Bresco was insolvent. The adjudicator refused. In consequence, Londsdale issued CPR pt 8

proceedings seeking an injunction to prevent the continuation of the adjudication. The judge held that: (i) the adjudicator did not have the necessary jurisdiction to deal with a claim advanced by a company in insolvent liquidation (the jurisdiction argument); and (ii) it would be unjust to permit an adjudication to continue in circumstances where the decision of the adjudicator would be incapable of enforcement (the utility argument). Bresco appealed (the Bresco appeal).

In the second appeal, the appellant (Cannon) engaged the respondent (Primus) to design and build a new hotel. During the engagement period, Primus served on Cannon a payment notice in the sum of £261,222.17. Cannon served a pay less notice in response, putting the amount due at nil. Shortly thereafter, Cannon served a notice of termination on Primus. There followed four adjudications and litigation between the parties. Prior to the fourth adjudication, Primus entered into a Company Voluntary Arrangement (CVA). In the fourth adjudication, Cannon failed to raise the jurisdiction argument and the adjudicator found in favour of Primus. As a result, Primus commenced proceedings to enforce the adjudicator's decision. The judge granted summary judgment in favour of Primus and refused to grant a stay of execution, notwithstanding the CVA. Cannon appealed (the Cannon appeal). Prior to the appeal hearing, the Cannon appeal settled. Notwithstanding, the Court of Appeal, Civil Division, exercised its discretion to hand down judgment.

Appeal dismissed.

Issues and decisions

(1) Whether an adjudicator could ever have the jurisdiction to deal with a claim by a company in insolvent liquidation.

Having regards to the concession by Lonsdale that the claim would not have given rise to a jurisdictional issue in court or in arbitration, there was 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. As a matter of principle, the choice of forum could not dictate whether or not the claim existed or had been extinguished (see [23], [31], [120], [121] of the judgment).

The judge in the Bresco appeal had been wrong to find that the adjudicator had had no jurisdiction to consider the claim. However, the theoretical existence of the adjudicator's jurisdiction was only the start of the analysis. In the circumstances of the present case, an adjudicator's decision in favour of Bresco, a company in insolvent liquidation facing a separate cross-claim, would not be capable of being enforced. That would make the adjudication an exercise in futility (see [62], [63], [120], [121] of the judgment).

Philpott (as joint liquidators of WGL Realisations 2010 Ltd) v Lycee Francais Charles de Gaulle School [2015] All ER (D) 175 (Apr) applied; *Stein v Blake* [1995] 2 All ER 961 considered; *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] All ER (D) 1132 considered; *Kaupthing Singer and Friedlander Ltd (in administration), Re* [2010] All ER (D) 72 (May) considered; *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd* [2010] All ER (D) 126 (Apr) considered.

(2) Whether an adjudication could ever have any utility in circumstances where the claim was by a company in insolvent liquidation.

The adjudication process on the one hand, and the insolvency regime on the other, were incompatible. 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. In the ordinary case, even though the adjudicator might technically have the necessary

jurisdiction, it was not a jurisdiction which could lead to a meaningful result (see [54], [120], [121] of the judgment).

The solution to the incompatibility issue was the one that had been adopted in the present case: the grant of an injunction to restrain the further continuation of the adjudication (see [55] of the judgment).

There was nothing in the facts of the present case that was relied on by Bresco which took the case out of the ordinary, or which demonstrated that it was just or convenient for the underlying adjudication to continue. On the contrary, all the evidence pointed the other way. Among other things, Bresco had been in insolvent liquidation for over three years before it had referred its claim to adjudication. Further, there was no evidence that Bresco would ever be able to trade again (see [60], [120], [121] of the judgment).

There had been no reason why the adjudication should have been permitted to continue; on the contrary, it was just and convenient to grant the injunction. Accordingly, Lonsdale was entitled to an injunction to prevent the continuation of the adjudication, not on the grounds of theoretical jurisdiction, but on the grounds of practical utility (see [61], [63], [120], [121] of the judgment).

Twintec Ltd v Volkerfitzpatrick Ltd [2014] All ER (D) 177 (Jan) applied.

(3) Whether Cannon had waived its right to raise a jurisdictional challenge.

Cannon could not presently be permitted to rely on its original general reservation of position in order to be able to raise the objection. Any proper jurisdiction objection was limited to the two points which the adjudicator had decided against Cannon and which had (rightly) not been resurrected. The general reservation had been too vague to be effective; in any event, it had to be regarded as having been superseded by the two specific objections that had been raised and which had failed. Moreover, it could not be said that Cannon had not known or should not have known about the argument that an adjudicator might not have the necessary jurisdiction to decide a claim by an insolvent company (see [99], [120], [121] of the judgment).

Had there been anything in the jurisdiction argument (which, in any event was rejected), then, while the point had always been open to Bresco because of the way in which it had arisen on the application for an injunction, the point was not open to Cannon, because it had not been the subject of any specific reservation (despite the fact that Cannon had known or should have known about the point) and the general reservation had not covered it and had been subsumed by the specific objections in any event (see [100], [120], [121] of the judgment).

The jurisdiction argument was not open to Cannon because it had not taken it before the adjudicator (or indeed before the judge) and its general reservation of position had not permitted that argument to be run on enforcement (see [115], [120], [121] of the judgment).

Allied P & L Ltd v Paradigm Housing Group Ltd [2009] All ER (D) 240 (Nov) applied; *Aedifice Partnership Ltd v Shah* [2010] All ER (D) 65 (Aug) applied; *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* [2010] All ER (D) 232 (Oct) applied; *Cia Maritima Zorroza SA v Sesostris SAE, The Marques de Bolarque* [1984] 1 Lloyd's Rep 652 considered; *Allied Vision Ltd v VPS Film Entertainment GmbH* [1991] 1 Lloyd's Rep 392 considered; *CN Associates (a firm) v Holbeton Ltd* [2011] All ER (D) 217 (Jan) considered; *Equitix ESI CHP (Wrexham) Ltd v Bester Generacion UK Ltd* [2018] All ER (D) 57 (Feb) considered.

(4) Whether the judge had erred in: (i) granting summary judgment in favour of Primus; and (ii) refusing Cannon's application for a stay of execution.

Had it remained live, the appeal against the judge's decision to grant summary judgment in favour of Primus would have failed. The judge had been entitled to enter summary judgment in favour of Primus (see [109], [116], [120], [121] of the judgment).

The general position relating to a CVA might, depending on the facts, be very different to a situation where the claimant company was in insolvent liquidation. In the latter case, claims being made by the company were part of what might be called a damage limitation exercise, whereby the liquidators endeavoured as best they could to pay dividends to creditors. A CVA was, or could be, conceptually different. It was designed to try and allow the company to trade its way out of trouble. In those circumstances, the quick and cost-neutral mechanism of adjudication might be an extremely useful tool to permit the CVA to work. In those circumstances, courts had to be wary of reaching any conclusions which prevented the company from endeavouring to use adjudication to trade out of its difficulties (see [108], [120], [121] of the judgment).

It had been plainly open to the judge to exercise his discretion against granting a stay of execution. On the facts of the case, having decided that he could enter summary judgment in favour of Primus, the refusal of the stay had almost been inevitable. Had it remained live, the appeal against the refusal to grant the stay would also have been refused (see [114], [117], [120], [121] of the judgment).

Having resolved the CVA issue at the summary judgment stage, it could not arise again in respect of the stay, or if it could, the same answer was appropriate. Further, a court would exercise its discretion against a stay if it concluded that the party seeking the stay was responsible, either wholly or in substantial party, for the claimant's financial difficulties. In the present case, that had been the conclusion reached (see [112], [113], [120], [121] of the judgment).

Wimbledon Construction Co 2000 Ltd v Vago [2005] All ER (D) 277 (Jun) applied; *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] All ER (D) 1132 considered; *Mead General Building Ltd v Dartmoor Properties Ltd* [2009] All ER (D) 224 (Mar) considered; *Westshield Ltd v Whitehouse* [2013] All ER (D) 292 (Nov) considered.

Decision of Fraser J [2018] EWHC 2043 (TCC) Affirmed.

Peter Arden QC and Chantelle Staynings (instructed by Blaser Mills LLP) for Bresco.

Thomas Crangle (instructed by Fladgate LLP) for Lonsdale.

Robert-Jan Temmink QC and Ms Charlotte Cooke (instructed by Fieldfisher LLP) for Cannon.

Adrian Williamson QC and Mr Peter Shaw QC (instructed by Child & Child Solicitors) for Primus.

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