

# ADJUDICATION AND INSOLVENCY: ARE THE TWO COMPATIBLE?

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- ▶ The Court of Appeal has given guidance to insolvent companies about whether to commence an adjudication.
- ▶ There is an important distinction to be drawn between a company in a CVA and one in liquidation.
- ▶ Parties need to be careful when making general reservations to an adjudicator's jurisdiction.

## What's it about?

The Court of Appeal recently heard the conjoined appeals of *Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited* and *Cannon Corporate Limited v Primus Build Limited* [2019] EWCA Civ 27.

Though the facts are not hugely important, in the first of the two appeals Bresco ceased work under a subcontract in December 2014 with both parties to that subcontract alleging wrongful termination. In March 2015 Bresco went into liquidation and this was followed by a claim from Lonsdale for the costs of completing the works. Bresco maintained that Lonsdale had wrongfully repudiated the subcontract and was liable for damages. Bresco subsequently issued a notice of adjudication in respect of its dispute with Lonsdale. Lonsdale objected to the adjudicator's jurisdiction, arguing that the set-off provisions contained within the Insolvency Rules now applied as Bresco was in liquidation. The adjudicator found that he did have jurisdiction, following which Part 8 proceedings were issued by Lonsdale for an injunction to prevent the continuation of the adjudication.

At first instance, the TCC granted the injunction on the basis that the adjudicator had no jurisdiction to deal with a contractual claim that no longer existed (by virtue of the insolvency) and instead the Insolvency Rules applied.

Interestingly, the Court of Appeal upheld the decision of the TCC but disagreed with its reasoning. Coulson LJ delivered the Court of Appeal judgment and found that there is a "basic incompatibility between adjudication and the regime set out in the [Insolvency] Rules". The solution to such incompatibility was "the one that was adopted in the present case: the grant of an injunction to restrain the further continuation of the adjudication".

## Why does it matter?

Importantly this case clarifies whether an adjudicator can decide claims made by an insolvent company when there is a counterclaim against it.

In finding that an adjudicator does have jurisdiction to consider a claim referred to it by a company in liquidation Coulson LJ compared adjudication to arbitration (to which a company in liquidation may still refer a claim) and could find no reason why an adjudicator's jurisdiction should be different to an arbitrator's.

That did not mean, however, that the adjudication was allowed to continue. Where there is a cross-claim against a company in liquidation, even if the company obtained an adjudicator's decision in its favour, such a decision would not generally be enforceable. As such, Coulson LJ concluded that the adjudicator's jurisdiction was "not a jurisdiction which can lead to a meaningful result".

Coulson LJ also queried why a responding party should have to incur the costs of defending an adjudication brought by a company in liquidation, when it knows that even if it was unsuccessful in the adjudication it would be able to resist summary judgment or enforcement but have to spend further sums to achieve that result. This seemed to him to be wrong in principle and, as was said in the case, commencing such an adjudication would be "an exercise in futility".

## Now what?

Thomas Crangle of 4 Pump Court, Counsel for the Respondent in the first appeal (*Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited*) commented:

"The Court of Appeal's decision means that in future, companies in liquidation will generally not be able to pursue claims in adjudication where the responding party has a genuine cross-claim against the company. A responding party with a cross-

claim facing such an adjudication will be able to stop the injunction in its tracks by obtaining an injunction, without having to incur the time and expense of defending the adjudication and resisting enforcement in the TCC".

The Court of Appeal also drew an important distinction between a claimant in a Company Voluntary Arrangement (CVA) and one in insolvent liquidation. In the second appeal Primus had entered into a CVA which was "designed to allow Primus to trade out of its difficulties" and should the CVA have run its full course, "Primus would [have] avoid[ed] liquidation altogether". As such the summary judgement granted to enforce the adjudicator's award stood.

Thus when considering whether an insolvent company should commence an adjudication, it is important to consider the nature and effects of the insolvency event to which the company is subject. The Court of Appeal highlighted that there are potentially important differences between a company in liquidation and a company in a CVA.

Finally, it is also worth noting from the second appeal the guidance given by the Court of Appeal on the care needed when reserving the right to challenge an adjudicator's jurisdiction. The Court of Appeal said that general reservations on the right to raise jurisdictional issues may in a lot of instances prove too vague and thus do not form part of a valid reservation. The Court of Appeal was, however, mindful that by raising specific issues a party may inadvertently waive the right to raise other jurisdictional issues in the future. Parties should therefore be careful to strike the correct balance in making jurisdictional challenges: not too vague to fall foul of the general reservation rules; but not too specific so as to waive any future right to raise other challenges to an adjudicator's jurisdiction.

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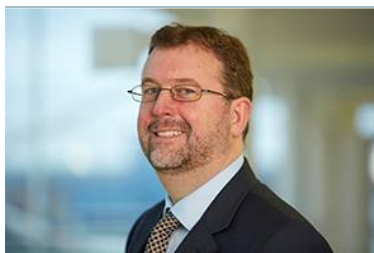
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