

Insolvency and Adjudication after *Lonsdale v Bresco* and *Cannon v Primus* – Matt Molloy

**Introduction**

1. This talk considers the current position regarding insolvency and adjudication following the Court of Appeal's Judgment in *Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited and Cannon Corporate Limited v Primus Build Limited* [2019] EWCA Civ 27 ("Bresco"). Before setting out the facts and the relevant findings of the Court of Appeal in *Bresco*, I will give a brief overview of corporate insolvency and the relevant legislation. After setting out the facts and findings of *Bresco*, I will cover the effect of *Bresco* on parties seeking to adjudicate against an insolvent party and also an insolvent party seeking to adjudicate.

**Corporate Insolvency – an overview**

2. Liquidation - commences with Court Order
  - (i) Compulsory Liquidation/winding up
  - (ii) Creditor's Voluntary Liquidation
  - (iii) Member's Voluntary Liquidation (Solvent)
3. S.130 of Insolvency Act 1986 – moratorium for Compulsory Liquidation. Liquidator can apply for stay of specific proceedings in CVL/MVL – permission of Court required.
4. Rule 14.25 Insolvency Rules 2016 – Set Off/Mutual Debts
5. Administration – commences with Court Order
6. Para 42/43 of Schedule B1 of Insolvency Act 1986 – moratorium – consent of Administrator and consent of Court.
7. Rule 14.24 Insolvency Rules 2016 – Set Off/Mutual Debts
8. Company Voluntary Arrangement ("CVA") – commences with a proposal of the directors to shareholders/unsecured creditors – if recommended to court, then put to vote of shareholders/creditors.
9. No moratorium, but terms of CVA agreement may bind creditors
10. No mutual Set Off, but terms of CVA agreement may provide for it.

**The facts and findings in *Bresco***

11. Conjoined Appeals – leading judgment by Coulson LJ
12. *Bresco* – Fraser J granted an injunction against *Bresco* due to lack of jurisdiction and also fact adjudication was a futile exercise – *Bresco* appealed.

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13. *Cannon* – HHJ Waksman QC – *Primus* given summary judgment for £2.128M following an adjudication decision and application for stay refused. *Cannon* appealed following knowledge of Fraser J judgment. *Cannon* and *Primus* settled after argument, but prior to judgment. CA nevertheless proceeded to judgment.
14. Appeal in *Bresco* re jurisdiction allowed, but injunction maintained based on futility argument. Coulson LJ found that Coulson J was wrong in *Enterprise Managed Services Limited v Tony McFadden Utilities Limited* [2009] EWHC 3222 (TCC).

*“31. On analysis, I can 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. Moreover, it must continue to exist for all purposes. The fact that a reference to adjudication may not result in a final and binding decision cannot mean that the underlying claim is somehow extinguished. As a matter of principle, the choice of forum cannot dictate whether or not the claim exists or has been extinguished.*

*32. It is inherent in any adjudication that the result may not be binding; that is one of the fundamental features of the process. It would be illogical if one of the fundamental features of adjudication somehow deprived the adjudicator of any jurisdiction.*

*33. Moreover, the argument overlooks the fact that although the result of an adjudication is not usually final, it may be final, or it may become final. This could happen because both parties agree to treat the decision as final and binding, or because the decision is not subsequently challenged by either party. If Mr Crangle were right, and the issue of jurisdiction turned on whether the decision was final or not, it would only be known whether the adjudicator did or did not have jurisdiction some time after the decision itself, when it was or was not challenged. That cannot be a rational approach to the issue of jurisdiction.*

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*54. For all these reasons, I am in no doubt that the adjudication process on the one hand, and the insolvency regime on the other, are 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. Thus, in the ordinary case, even though the adjudicator may technically have the*

*necessary jurisdiction, it is not a jurisdiction which can lead to a meaningful result.”*

15. Appeal in *Cannon* dismissed. Also found that there was a waiver.

78. Judge Waksman QC's judgment can be found at [2018] EWHC 2143 (TCC). One point should be made at the outset. The judge expressly concluded at [25] that:

*“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.”*

*This is therefore a very different case to the straightforward situation where the claiming company is in insolvent liquidation and the liquidator is engaged in the process of recovering what he can 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, on the judge's findings, if the CVA was allowed to run its proposed course, Primus would avoid liquidation altogether.”*

#### **Adjudication against an insolvent party**

16. Liquidation – moratorium on proceedings (S.130 of Insolvency Act 1986) – *A Straume (UK) Ltd v Bradlor Developments Ltd* [2000] BCC 333.

17. Administration – there may be a moratorium on proceedings (as Para 42/43 Schedule B2 of Insolvency Rules 2016). May be futile, although declaration

18. CVA – no restriction, terms of CVA may prevent recovery.

#### **Adjudication by an insolvent party**

19. Liquidation – jurisdiction, but futility suggests an injunction would be available if Court satisfied it was an exercise in futility.

20. Administration – depends on whether notice to make a distribution has been made. Prior to the notice, similar principles as for CVA; Post notice, as for liquidation.

21. CVA – no restriction, but stay may be granted based on the circumstances and the current trading position, therefore a relevant factor.

## Appendix

### Extract from Insolvency Act 1986

#### **130 Consequences of winding-up order.**

- (1) On the making of a winding-up order, a copy of the order must forthwith be forwarded by the company (or otherwise as may be prescribed) to the registrar of companies, who shall enter it in his records relating to the company.
  - (2) When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose.
  - (3) When an order has been made for winding up a company [registered but not formed under the Companies Act 2006], no action or proceeding shall be commenced or proceeded with against the company or its property or any contributory of the company, in respect of any debt of the company, except by leave of the court, and subject to such terms as the court may impose.
- [(3A) In subsections (2) and (3), the reference to an action or proceeding includes action in respect of the company under Part 1 of Schedule 8 to the Finance (No. 2) Act 2015 (enforcement by deduction from accounts).]
- (4) An order for winding up a company operates in favour of all the creditors and of all contributories of the company as if made on the joint petition of a creditor and of a contributory.

#### **Schedule B1**

##### **Moratorium on insolvency proceedings**

- 42
- (1) This paragraph applies to a company in administration.
  - (2) No resolution may be passed for the winding up of the company.
  - (3) No order may be made for the winding up of the company.
  - (4) Sub-paragraph (3) does not apply to an order made on a petition presented under—
    - (a) section 124A (public interest), or
    - (aa) section 124B (SEs),
    - (b) section 367 of the Financial Services and Markets Act 2000 (c. 8) (petition by [Financial Conduct Authority or Prudential Regulation Authority]).

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- (5) If a petition presented under a provision referred to in sub-paragraph (4) comes to the attention of the administrator, he shall apply to the court for directions under paragraph 63

**Moratorium on other legal process**

- 43 (1) This paragraph applies to a company in administration.
- (2) No step may be taken to enforce security over the company’s property except—
  - (a) with the consent of the administrator, or
  - (b) with the permission of the court.
- (3) No step may be taken to repossess goods in the company’s possession under a hire-purchase agreement except—
  - (a) with the consent of the administrator, or
  - (b) with the permission of the court.
- (4) A landlord may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company except—
  - (a) with the consent of the administrator, or
  - (b) with the permission of the court.
- (5) In Scotland, a landlord may not exercise a right of irritancy in relation to premises let to the company except—
  - (a) with the consent of the administrator, or
  - (b) with the permission of the court.
- (6) No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except—
  - (a) with the consent of the administrator, or
  - (b) with the permission of the court.
- (6A) An administrative receiver of the company may not be appointed.
- (7) Where the court gives permission for a transaction under this paragraph it may impose a condition on or a requirement in connection with the transaction.
- (8) In this paragraph “landlord” includes a person to whom rent is payable

**Extracts from The Insolvency (England and Wales) Rules 2016**

**Administration: mutual dealings and set-off**

**14.24.**—(1) This rule applies in an administration where the administrator intends to make a distribution and has delivered a notice under rule 14.29.

(2) An account must be taken as at the date of the notice of what is due from the company and a creditor to each other in respect of their mutual dealings and the sums due from the one must be set off against the sums due from the other.

(3) If there is a balance owed to the creditor then only that balance is provable in the administration.

(4) If there is a balance owed to the company that must be paid to the administrator as part of the assets.

(5) However if all or part of the balance owed to the company results from a contingent or prospective debt owed by the creditor then the balance (or that part of it which results from the contingent or prospective debt) must be paid in full (without being discounted under rule 14.44) if and when that debt becomes due and payable.

(6) In this rule—

“obligation” means an obligation however arising, whether by virtue of an agreement, rule of

law or otherwise; and

“mutual dealings” means mutual credits, mutual debts or other mutual dealings between the company and a creditor proving or claiming to prove for a debt in the administration but does not include any of the following—

- (a) a debt arising out of an obligation incurred after the company entered administration;
- (b) a debt arising out of an obligation incurred at a time when the creditor had notice that—
  - (i) an application for an administration order was pending, or
  - (ii) any person had delivered notice of intention to appoint an administrator;
- (c) a debt arising out of an obligation where—
  - (i) the administration was immediately preceded by a winding up, and
  - (ii) at the time when the obligation was incurred the creditor had notice that a decision had been sought from creditors under section 100(a) on the nomination of a liquidator or that a winding-up petition was pending;
- (d) a debt arising out of an obligation incurred during a winding up which immediately preceded the administration; or
- (e) a debt which has been acquired by a creditor by assignment or otherwise, under an agreement between the creditor and another party where that agreement was entered into—
  - (i) after the company entered administration,
  - (ii) at a time when the creditor had notice that an application for an administration order was pending,

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- (iii) at a time when the creditor had notice that any person had given notice of intention to appoint an administrator,
  - (iv) where the administration was immediately preceded by a winding up, at a time when the creditor had notice that a decision had been sought from creditors under section 100 on the nomination of a liquidator or that a winding-up petition was pending, or
  - (v) during a winding up which immediately preceded the administration.
- (7) A sum must be treated as being due to or from the company for the purposes of paragraph whether—
- (a) it is payable at present or in the future;
  - (b) the obligation by virtue of which it is payable is certain or contingent; or
  - (c) its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.
- (8) For the purposes of this rule—
- (a) rule 14.14 applies to an obligation which, by reason of its being subject to a contingency or for any other reason, does not bear a certain value;
  - (b) rules 14.21 to 14.23 apply to sums due to the company which—
    - (i) are payable in a currency other than sterling,
    - (ii) are of a periodical nature, or
    - (iii) bear interest; and
  - (c) rule 14.44 applies to a sum due to or from the company which is payable in the future.

**Winding up: mutual dealings and set-off**

- 14.25.**—(1) This rule applies in a winding up where, before the company goes into liquidation, there have been mutual dealings between the company and a creditor of the company proving or claiming to prove for a debt in the liquidation.
- (2) An account must be taken of what is due from the company and the creditor to each other in respect of their mutual dealings and the sums due from the one must be set off against the sums due from the other.
  - (3) If there is a balance owed to the creditor then only that balance is provable in the winding up.
  - (4) If there is a balance owed to the company then that must be paid to the liquidator as part of the assets.
  - (5) However if all or part of the balance owed to the company results from a contingent or prospective debt owed by the creditor then the balance (or that part of it which results from the contingent or prospective debt) must be paid in full (without being discounted under rule 14.44) if and when that debt becomes due and payable.
  - (6) In this rule—
    - “obligation” means an obligation however arising, whether by virtue of an agreement, rule of law or otherwise; and

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“mutual dealings” means mutual credits, mutual debts or other mutual dealings between the company and a creditor proving or claiming to prove for a debt in the winding up but does not include any of the following—

- (a) a debt arising out of an obligation incurred at a time when the creditor had notice that—
  - (i) a decision had been sought from creditors on the nomination of a liquidator under section 100, or
  - (ii) a petition for the winding up of the company was pending;
- (b) a debt arising out of an obligation where—
  - (i) the liquidation was immediately preceded by an administration, and
  - (ii) at the time the obligation was incurred the creditor had notice that an application for an administration order was pending or a person had delivered notice of intention to appoint an administrator; and
- (c) a debt arising out of an obligation incurred during an administration which immediately preceded the liquidation;
- (d) a debt which has been acquired by a creditor by assignment or otherwise, under an agreement between the creditor and another party where that agreement was entered into—
  - (i) after the company went into liquidation,
  - (ii) at a time when the creditor had notice that a decision had been sought from creditors under section 100 on the nomination of a liquidator,
  - (iii) at a time when the creditor had notice that a winding-up petition was pending,
  - (iv) where the winding up was immediately preceded by an administration at a time when the creditor had notice that an application for an administration order was pending or a person had delivered notice of intention to appoint an administrator, or
  - (v) during an administration which immediately preceded the winding up.
- (7) A sum must be treated as being due to or from the company for the purposes of paragraph (2) whether—
  - a. it is payable at present or in the future;
  - b. the obligation by virtue of which it is payable is certain or contingent; or
  - c. its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.
- (8) For the purposes of this rule—
  - (a) rule 14.14 applies to an obligation which, by reason of its being subject to a contingency or for any other reason, does not bear a certain value;
  - (b) rules 14.21 to 14.23 apply to sums due to the company which—
    - (i) are payable in a currency other than sterling,
    - (ii) are of a periodical nature, or
    - (iii) bear interest; and
  - (c) rule 14.44 applies to a sum due to or from the company which is payable in the future.