



GENERAL RESERVATIONS OF RIGHTS IN ADJUDICATION AFTER BRESKO ELECTRICAL SERVICES V MICHAEL J LONSDALE

Gaynor Chambers considers general reservations of rights in the context of adjudications by reference to various cases, including *Bresco Electrical Services Limited (in liquidation) and Michael Lonsdale (Electrical) Limited*¹.

Introduction

I have dealt with various challenges to my jurisdiction following appointment as an adjudicator. Some are simple, others relatively complex, particularly those arising out of power generation projects and the exemption within section 105(2) of the Housing Grants, Construction and Regeneration Act 1996.

Even if no specific challenge is made, it is common practice for respondents to include a general reservation of rights within their adjudication submissions. The wording used is often very wide, stating that the responding party's position in respect of the reference is fully reserved, and that it further reserves all rights in respect of jurisdictional or other issues in the adjudication or any other proceedings (or words to that effect).

Challenges in Practice

This practice appears to have its roots in cases such as *Allied P & L Limited v Paradigm Housing Group Limited*², in which the responding party took various points on jurisdiction during the course of the adjudication, each of which failed. Although the responding party discovered a much better argument after the adjudicator had reached a decision, it was not allowed to rely on its to resist enforcement as the responding party had not previously referred to it or reserved its

position in respect of it. However, Akenhead J left open the issue as to whether a general reservation without any hint or suggestion as to what the grounds are could be effective.

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Ramsey J then considered the issue further in *GPS Marine Limited v Ringway Limited*³, concluding by analogy with authorities in the context of arbitration prior to the provisions of section 73 of the Arbitration Act 1996 that if the words of a reservation were sufficiently clear they could prevent a party's subsequent participation in an adjudication from amounting to a waiver or ad hoc submission.

Therefore, many respondents appear to view a general reservation of rights as offering a more effective means of protecting their position in due course than a specific challenge, particularly in situations where the commencement of the adjudication has been a surprise and so the responding party does not want to risk missing a point and being subsequently precluded from relying on it. Others take

specific points but also add a general reservation of rights as a fall back position, hoping to then be able to bring up other issues on enforcement.

Whilst it is understandable that a responding party would want to use a general rather than specific approach in order to try to keep all options open, this approach raises difficulties for both the adjudicator and the referring party. The adjudicator cannot investigate the grounds for resisting jurisdiction as none are identified and cannot therefore decide whether or not to proceed. Similarly, the referring party cannot decide whether the responding party has made a good point and take steps to remedy the situation by, for example, starting a new adjudication.

Bresco Electrical v Michael J Lonsdale

The Court of Appeal recently tackled this vexed topic head on in *Bresco Electrical Services Limited (in liquidation) and Michael J Lonsdale (Electrical) Limited*.

That case was primarily concerned with the interplay between adjudication and the insolvency regime⁴, but Lord Justice Coulson also took the opportunity to set out his views on jurisdictional matters, stating that *"arguments about waiver and general reservations of position arise much more often in adjudication cases than they should"*⁵.

As Coulson LJ pointed out, the difficulty with a general reservation of jurisdiction is that it means that a party can participate in an adjudication, decide it isn't keen on the result, and then *"comb through the documents in the hope that 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"*⁶.

Cannon, the responding party in *Bresco Electrical*, had emailed the adjudicator on 17th March 2018, noting the agreed timetable for the adjudication and then stating *"... 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"*⁷.

Cannon subsequently emailed the adjudicator again repeating the general reservation of rights but also raising two specific challenges to the adjudicator's jurisdiction, firstly that the responding party had cherry picked parts of the account in their claim and second that there was no crystallised dispute. These two points were rejected by the adjudicator and subsequently by Judge Waksman QC.

In its application for permission to appeal, Cannon sought to raise an argument that the adjudicator did not have jurisdiction because the referring party Primus was the subject of a Company Voluntary Agreement (CVA) for the first time.

Coulson LJ was firmly against Cannon on this point, stating that any proper jurisdictional objection was limited to the two points which the adjudicator decided against Cannon, and that either the general reservation was *"too vague to be effective"* or ought to be regarded as having been superseded by the two specific arguments which had been raised and failed.

The judge differed from Ramsey J in *GPS Marine* by finding that the reasoning in cases dealing with general waivers in the context of arbitrations were not of direct application, and that this informed the starting point when considering the applicable principles on waiver and general

reservations in an adjudication context. His analysis of those principles at paragraph 92 of the judgment makes interesting reading:

- "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, decided 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 the way that simply to try and ensure that all options (including ones not even thought of) could be kept open (Equitix)".

Conclusion

So, what does this mean in practice? Whilst the judgment does not entirely preclude general reservations of rights from being effective, it means that the prospects of successfully relying on any such general reservation are greatly reduced. Any such reservations could almost invariably be construed on enforcement as being attempts to try to ensure that all options are being kept open, falling foul of the principle at paragraph 92(iv)ii).

It also means that responding parties and those representing them need to take care to consider specific grounds rather than simply relying on a carefully worded general reservation, as even careful wording will not assist if the argument being raised on enforcement is one which ought to have been known about and raised before the adjudicator. The issue of what a responding party should have known may therefore prove to be a key issue in future enforcement applications in the light of Coulson LJ's analysis.



¹ [2019] EWCA Civ 27

² [2009] EWHC 2890 (TCC)

³ [2010] EWHC 283 (TCC)

⁴ See also the subsequent case of *Indigo v Razin* [2019] EWHC 1205 (TCC): <https://www.keatingchambers.com/case-report/indigo-v-razin/>

⁵ Paragraph 82

⁶ Paragraph 91

⁷ Paragraph 93

⁸ Paragraph 99