Neutral Citation Number: [2019] EWCA Civ 27

Case No: A1/2018/2009 & A1/2018/1835

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(Technology and Construction Court)
Mr Justice Fraser
HT2018000186
&
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(Technology and Construction Court)
His Honour Judge Waksman QC
CL-1999-000004

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2019

Before:

THE PRESIDENT OF THE FAMILY DIVISION
(Sir Andrew McFarlane)
LADY JUSTICE KING
and
LORD JUSTICE COULSON

- -

Between:

(2009)	**Bresco Electrical Services Limited (in liquidation)**	**Appellant**
	- and -	
	Michael J Lonsdale (Electrical) Limited	**Respondent**
	&	
(1835)	**Cannon Corporate Limited**	**Appellant**
	- and -	
	Primus Build Limited	**Respondent**

- -

Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd
Mr Peter Arden QC & Ms Chantelle Staynings (instructed by **Blaser Mills LLP**) for the **Appellant (Bresco)**
Mr Thomas Crangle (instructed by **Fladgate LLP**) for the **Respondent (Lonsdale)**

Cannon Corporate Ltd v Primus Build Ltd
Mr Robert-Jan Temmink QC & Ms Charlotte Cooke (instructed by **Fieldfisher LLP**) for the **Appellant (Cannon)**

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

Hearing Date: Wednesday 28th November 2018

- -

Approved Judgment

Lord Justice Coulson:

1. Introduction

1. These conjoined appeals raise important issues as to the interplay between the construction adjudication process, on the one hand, and the insolvency regime, on the other. Ever since the decision of this court in *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2000] BLR 522, where the point arose in a distinctly unsatisfactory way, the extent (if at all) to which an adjudicator can decide claims made by an insolvent company which can then be summarily enforced has not remained free from doubt. It is hoped that the guidance given below will be of some assistance on this issue.

2. In the *Bresco* appeal, Bresco Electrical Services Ltd (in liquidation) ("Bresco") seek to set aside the order of Fraser J dated 31 July 2018 by which, at the request of Michael J Lonsdale (Electrical) Ltd ("Lonsdale"), he granted an injunction preventing the continuation of an adjudication in which Bresco (who are in insolvent liquidation) sought declarations and sums said to be due and payable by Lonsdale. The basis for the injunction was Bresco's insolvency and Lonsdale's cross-claim. In the *Cannon* appeal, Cannon Corporate Ltd ("Cannon") seek to set aside the order of HHJ Waksman QC (as he then was) dated 27 July 2018, by which he granted summary judgment in favour of Primus, and refused to grant a stay of execution, notwithstanding the fact that, due to solvency issues, Primus were in a Company Voluntary Arrangement ("CVA"). The unspoken suggestion throughout this appeal was that, since they gave rise to markedly different outcomes, one or other of these judgments must be wrong.

3. The *Bresco* appeal raises directly the issue of whether an adjudicator can ever have the jurisdiction to deal with a claim by a company in insolvent liquidation. But there was also a related issue, concerned with 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.

4. In the *Cannon* appeal, despite Primus' CVA, there were a number of adjudications between the parties, followed by summary judgment in their favour in the sum of £2.128 million odd, and a refusal of any stay of execution. The jurisdiction/utility issue, raised successfully by Lonsdale in the *Bresco* appeal when they obtained their injunction from Fraser J, was not raised by Cannon before the adjudicator or – as I find at paragraphs 96-98 below – before HHJ Waksman QC. Thus, although Cannon now wish to take the same jurisdictional point that Lonsdale successfully argued in their case, Primus submit that the argument is not open to Cannon because they did not take the point before the adjudicator, thereby waiving any right to raise a jurisdictional challenge. That therefore raises a separate issue in the *Cannon* appeal as to waiver and the proper scope of what is sometimes referred to as a general reservation of position. The *Cannon* appeal also raises questions as to the exercise of the judge's discretion both in relation to his decision to grant summary judgment in favour of Primus and, more particularly, his decision to refuse Cannon's application for a stay of execution.

5. On 12 December 2018, two weeks after the hearing, and when this judgment was in an advanced state of completion, the court was informed that the *Cannon* appeal had settled. In their courteous letter, leading counsel acknowledged that, despite their compromise, the court retained a discretion as to whether or not to hand down the judgment in the *Cannon* appeal. Given the close links between the issues raised in the two appeals, and the important issue as to waiver raised in the *Cannon* appeal, it was decided that our judgments would address both appeals and be handed down in the usual way. The parties were informed of this decision on 13 December 2018.

6. This judgment is set out in the following way. In **Section 2** (paragraphs 9-13 below), I set out the facts of the *Bresco* appeal. In **Section 3** (paragraphs 14-36 below), I deal with the jurisdiction arguments raised in that appeal and, in **Section 4** (paragraphs 37-61 below), I deal with the related question of the utility of an adjudication in these circumstances, and the extent to which the responding party can obtain an injunction to halt the adjudication at any earlier stage. **Section 5** (paragraphs 62-63 below), sets out what I consider to be the necessary disposal of the *Bresco* appeal.

7. In **Section 6** (paragraphs 64-81 below), I set out the facts in the *Cannon* appeal. In **Section 7** (paragraphs 82-100 below), I deal with the arguments as to waiver and general reservations of position, and in **Section 8** (paragraphs 101-114 below), I deal with the discretion arguments. In **Section 9** below (paragraphs 115-118 below), I set out my conclusions on the issues raised in the *Cannon* appeal, bearing in mind the parties' compromise. In **Section 10** (paragraph 119 below) there is a short summary of my proposed disposal of these appeals.

8. At the outset I should express my thanks to all counsel for their clear written and oral submissions, and the efficiency with which the appeal hearing itself was conducted[1]. I apprehend that some of the arguments as to the insolvency regime and the Insolvency Rules 2016 ("the Rules") which were addressed to this court have not been raised at an adjudication enforcement hearing before. That is one reason why, in one respect at least, I find myself departing from some of the first instance authorities.

2. Bresco v Lonsdale: The Facts

9. By a sub-sub-contract dated 21 August 2014, Bresco agreed to perform electrical installation works for Lonsdale at 6, St James Square, London SW1. Bresco became insolvent and entered into voluntary liquidation on 12 March 2015. Mr Ailyan of Abbot Fielding Limited was appointed as the liquidator. It has never been suggested that their liquidation was caused or substantially caused by Lonsdale.

10. By a letter dated 2 October 2017, Lonsdale intimated a claim against Bresco, on the basis that it was Bresco's default that had led to the termination of the sub-sub-contract. Lonsdale indicated a claim in the sum of £325,541.92, principally made up of the costs of engaging a replacement sub-sub-contractor. Bresco responded by suggesting that it was owed money for work it had carried prior to the termination. Bresco did not at that stage suggest that Lonsdale had wrongly terminated the sub-sub-contract.

[1] For reasons which will become apparent below, I should make plain at the outset that Mr Temmink QC, who appeared for Cannon at the appeal hearing, had had no involvement whatsoever in the earlier stages of the case.

11. Over 3 years after the liquidation, on 18 June 2018, Bresco served an adjudication notice, purporting to refer to adjudication a claim that Lonsdale had wrongfully repudiated the sub-sub-contract, together with claims for unpaid work and other sums, amounting to £220,000 odd. On 21 June, Mr Tony Bingham was appointed as the adjudicator. Lonsdale asked the adjudicator to discontinue the adjudication on the basis that he had no jurisdiction, because Bresco were insolvent and had been placed into insolvent liquidation. Mr Bingham refused to discontinue the adjudication and produced a "non-binding decision" which indicated that he thought he did have jurisdiction to determine the dispute. In consequence, Lonsdale issued Part 8 proceedings in the Technology and Construction Court ("TCC") seeking an injunction to prevent the continuation of the adjudication.

12. The matter came before Fraser J on 11 July 2018. His reserved judgment was handed down on 31 July 2018 ([2018] EWHC 2043 (TCC)). He dealt with a number of the authorities which I revisit in **Section 3** below. He granted a declaration to the effect 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."

13. In summary, he reached that view for two reasons. First, on the authorities, Fraser J concluded that the adjudicator did not have the necessary jurisdiction to deal with a claim advanced by a company in insolvent liquidation. Second, when dealing with the case of *Philpott & Another v Lycee Francais Charles De Gaulle School* [2015] EWHC 1065 (Ch) (a case which I address below, in which HHJ Purle QC held that it was "inconceivable" that any adjudicator's decision in favour of a company in insolvent liquidation would be enforced), Fraser J noted at [51.3]:

> "3. The statement that adjudication is an available process, but the courts will not enforce it, ignores two important elements. Firstly, it ignores the dicta by Edwards-Stuart J at [63] in ***Twintec v Volker Fitzpatrick*** where he stated "I am unable to see how it would be either just or convenient to permit an adjudication to continue in circumstances where the decision of the adjudicator will be incapable of enforcement."…"

I refer to this below as the utility argument.

3. Jurisdiction

3.1 Lonsdale's Core Submission

14. Although Lonsdale are the respondents to the *Bresco* appeal, it is as well to start with their core submission, and their key concession, in order to understand the relatively narrow issue as to jurisdiction that now arises for decision.

15. Section 108 of the *Housing Grants (Construction and Regeneration) Act 1996* ("the 1996 Act") provides that "a party to a construction contract has the right to refer a dispute arising out of the contract for adjudication…". These days, most contracts in

the construction industry contain an express term to that effect. This sub-sub-contract was no different: it incorporated The Scheme for Construction Contracts, which contains detailed provisions permitting "any party to a construction contract…[to] give written notice…at any time of his intent to refer any dispute arising under the contract, to adjudication". Both Bresco and Lonsdale therefore had the right to refer a dispute arising under their construction contract to adjudication.

16. Lonsdale (supported by Cannon in their appeal) argued that this right was lost when Bresco went into liquidation. They said that, at that point, there ceased to be any claim under the contract, because it was replaced with the single right to claim the balance (if any), arising out of the mutual dealings and set-off between the parties.

17. That proposition relied on what is now Rule 14.25 of the Rules. The relevant parts of the Rule are as follows:

> "**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. …"

18. The leading case on how this provision operates in practice is the decision of the House of Lords in *Stein v Blake* [1996] 1 A.C. 243. Although the case is about an earlier version of Rule 14.25, there is no material difference in the wording. The relevant passages in the judgment of Lord Hoffmann are as follows:

> "7. The occasion for taking the account
>
> In what circumstances must the account be taken? The language of section 323(2) suggests an image of the trustee and creditor sitting down together, perhaps before a judge, and debating how the balance between them should be calculated. But the taking of the account really means no more than the calculation of the balance due in accordance with the principles of insolvency law. An obvious occasion for making this calculation will be the lodging of a proof by a creditor against whom the bankrupt had a cross-claim. Indeed, it might have been thought from the words "any creditor of the bankrupt proving or claiming to prove from a bankruptcy debt" in

section 323(1) that the operation of the section actually depended upon the lodging of a proof. But it has long been held that this is unnecessary and that the words should be construed to mean "any creditor of the bankrupt who (apart from section 323) would have been entitled to prove for a bankruptcy debt". Thus the account to which section 323(2) refers may also be taken in an action by the trustee against a creditor who, because his cross-claim does not exceed that of the trustee, has not lodged a proof: see *Mersey Steel and Iron Co. v. Naylor Benzon & Co.* (1882) 9 Q.B.D. 648 and *In re Daintrey* [1900] 1 Q.B. 546, 568.

Once one has eliminated any need for a proof in order to activate the operation of the section, it ceases to be linked to any step in the procedure of bankruptcy or litigation. This is a sharp contrast with legal set-off, which can be invoked only by the filing of a defence in an action. Section 323, on the other hand, operates at the time of bankruptcy without any step having to be taken by either of the parties. The "account" in accordance with section 323(2) must be taken whenever it is necessary for any purpose to ascertain the effect which the section had…

8. Do the causes of action survive?

The principles so far discussed should provide an answer to the first of the issues in this appeal, namely, whether if A, against whom B has a cross-claim, becomes bankrupt, A's claim against B continues to exist as a chose in action so that A's trustee can assign it to a third party. In my judgment the conclusion must be that the original chose in action ceases to exist and is replaced by a claim to a net balance. If the set-off is mandatory and self-executing and results, as of the bankruptcy date, in only a net balance being owing, I find it impossible to understand how the cross-claims can, as choses in action, each continue to exist.

This was the conclusion of Neill J. in *Farley v. Housing & Commercial Developments Ltd* [1984] B.C.L.C. 442. Mr. Farley was the principal shareholder in W. Farley & Co. (Builders) Ltd, which in 1972 had entered into two agreements with the defendant company to build blocks of flats. Both led to disputes, with claims by the building company for money due under the contracts and cross-claims by the defendant for damages. In 1975 the building company went into insolvent liquidation. In 1979 the liquidator purported to assign to Mr. Farley the benefit of the agreements and all moneys payable thereunder. Mr. Farley then commenced arbitration proceedings under the agreements. The arbitrator stated a special consultative case (p. 447) asking:

> "(1) Whether by reason of the provisions of [the then equivalent of section 323 as applied to companies] upon the contractor becoming insolvent and being wound up . . . the debts due under the [two agreements] ceased to have a separate existence as chooses in action (and thus thereafter could not be assigned) being replaced by a balance of account under [section 323]."
>
> Neill J. answered in the affirmative. I think that he was right. *The cross-claims must obviously be considered separately for the purpose of ascertaining the balance. For that purpose they are treated as if they continued to exist. So, for example, the liquidator or trustee will commence an action in which he pleads a claim for money due under a contract and the defendant will counterclaim for damages under the same or a different contract.* This may suggest that the respective claims actually do continue to exist until the court has decided the amounts to which each party is entitled and ascertained the balance due one way or the other in accordance with section 323. But the litigation is merely part of the process of retrospective calculation, from which it will appear that from the date of bankruptcy, the only chose in action which continued to exist as an assignable item of property was the claim to a net balance." (Emphasis supplied)

19. Some useful guidance as to the analysis in *Stein v Blake* can be found in the decision of this court in *Re Kaupthing Singer and Friedlander Limited (in administration)* [2010] EWCA Civ 518; [2011] B.C.C. 555. There, the argument that the underlying claims were extinguished for all purposes was rejected. Etherton LJ (as he then was) said at paragraph 33:

> "…There is no reason whatever to think that the introduction of a mechanism for set-off of future debts, and the discounting of such debts for that purpose, was for any other reason than the usual objectives I have mentioned. In particular, there is no coherent or rational policy reason to release the creditor from a substantial part of the creditor's indebtedness to the company when, and to the extent that, such release is not necessary to achieve a set-off of cross-claims."

20. One of the earliest cases dealing with the summary enforcement of an adjudicator's decision was *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2000] EWCA Civ 507; [2000] BLR 522. The adjudicator had made a mistake in the calculation of the sum due, but Dyson J (as he then was) enforced the decision because the error had been made within the adjudicator's jurisdiction. The Court of Appeal upheld that conclusion, although Chadwick LJ raised (for the first time) an issue as to the Rules and the decision in *Stein v Blake*. Chadwick LJ's judgment on this point should be set out in full:

> "33. The importance of the rule is illustrated by the circumstances in the present case. If Bouygues is obliged to pay

to Dahl-Jensen the amount awarded by the adjudicator, those monies, when received by the liquidator of Dahl-Jensen, will form part of the fund applicable for distribution amongst Dahl-Jensen's creditors. If Bouygues itself has a claim under the construction contract, as it currently asserts, and is required to prove for that claim in the liquidation of Dahl-Jensen, it will receive only a dividend pro rata to the amount of its claim. It will be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim.

34. Lord Hoffman pointed out, at page 252 in *Stein v Blake* that the bankruptcy set-off requires an account to be taken of liabilities which at the time of the bankruptcy may be due but not yet payable, or which may be unascertained in amount or subject to contingency. Nevertheless, the insolvency code requires that the account shall be deemed to have been taken, and the sums due from one party shall be set off against the other, as at the date of insolvency order. Lord Hoffman pointed out also that it was an incident of the rule that claims and cross-claims merge and are extinguished; so that, as between the insolvent and the other party, there is only a single claim — represented by the balance of the account between them. In those circumstances it is difficult to see how a summary judgment can be of any advantage to either party where, as the 1996 Act and paragraph 31 of the Model Adjudication Procedure make clear, the account can be reopened at some stage; and has to be reopened in the insolvency of Dahl-Jensen.

35. Part 24, rule 2 of the Civil Procedure Rules enables the court to give summary judgment on the whole of a claim, or on a particular issue, if it considers that the defendant has no real prospect of successfully defending the claim and there is no other reason why the case or issue should be disposed of at a trial. In circumstances such as the present, where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in the liquidation, in which full account can be taken and a balance struck. That is what rule 4.90 of the Insolvency Rules 1986 requires.

36. It seems to me that those matters ought to have been considered on the application for summary judgment. But the point was not taken before the judge and his attention was not, it seems, drawn to the provisions of the Insolvency Rules 1986. Nor was the point taken in the notice of appeal. Nor was it embraced by counsel for the appellant with any enthusiasm when it was drawn to his attention by this Court. In those

> circumstances — and in the circumstances that the effect of the summary judgment is substantially negated by the stay of execution which this court will impose — I do not think it right to set aside an order made by the judge in the exercise of his discretion. I too would dismiss this appeal."

21. In addition, throughout the current appeal, we were referred to a number of passages from my judgment in *Enterprise Managed Services Limited v Tony McFadden Utilities Limited* [2009] EWHC 3222 (TCC); [2010] BLR 89. In that case, there were a variety of reasons why the adjudicator's decision was not enforced (the claims arose under a multiplicity of contracts; the claim that was assigned was not the claim referred to adjudication; the dispute had not crystallised by the time of the adjudication notice etc). The paragraphs dealing with the adjudicator's jurisdiction are [65] – [70]:

> "65. In my analysis, Utilities have not sought to refer to adjudication the dispute as to their right to an account and a balance due under Rule 4.90. Instead, they have purported to refer to adjudication TML's disputed claim against Enterprise under the novated NLSDA Sub-Contract. That is the only claim identified in the Adjudication Notice which is, of course, the document from which the Adjudicator derives his jurisdiction: see *Griffin v. Midas Homes* [2000] 78 Con LR 152. Moreover, one of the decisions sought by Utilities is to the effect that Enterprise cannot in the adjudication rely on their Lot 8 claim, which is entirely consistent with their stance that only the NLSDA dispute has been referred. However, for the reasons set out below, I am in no doubt that Utilities did not have the right to refer to adjudication, or seek to ringfence within that adjudication, the dispute under the NLSDA Sub-Contract, which is just one element of the Rule 4.90 mechanism.
>
> 66. First, I conclude that, as a matter of law, the claim for sums due under the NLSDA Sub-Contract has, in the unequivocal words of Lord Hoffmann in *Stein v. Blake*, "ceased to exist". Following the liquidation of TML and the assignment of the right under Rule 4.90, as he put it, "the only chose in action which continued to exist as an assignable item of property was the claim to a net balance". Thus the claim under the NLSDA Sub-Contract could not be and was not assigned to Utilities. Because it was no longer extant, it was incapable of assignment under the *Law of Property Act 1925*.
>
> 67. Miss Barwise argued that the claim under the NLSDA Sub-Contract did continue to exist because that was the way in which the balance could be ascertained under Rule 4.90. It seems to me that that suggestion was roundly rejected by Lord Hoffmann in *Stein v. Blake* at page 255F of the report, where he said in terms that such a claim was "merely part of the process of retrospective calculation" and repeated that the only claim which could now exist was the claim to the net balance.

> 68. Accordingly, I find that the only chose in action which TML's liquidators could assign, and did assign, was the claim to a net balance which arose out of the mutual dealings on four separate Sub-Contracts, at least one of which was not even a construction contract. That claim could not be referred to adjudication for the reasons noted at paragraphs 61-64 above.
>
> 69. Secondly, in the absence of any agreement between the parties, it would not be in accordance with the *Insolvency Rules* for the calculation of the net balance under Rule 4.90 to be performed in what might be described as a piecemeal or hobbled fashion. Even if the original claim under the NLSDA Sub-Contract somehow continued to exist, it was only as one part of the mechanism for the arriving at a net balance arising from the mutual dealings. Absent agreement between the parties, there is nothing in Rule 4.90 which would justify subjecting this mechanism to the piecemeal, element-by-element approach encompassed in multiple adjudications, particularly in circumstances where, such as here, not all the relevant parties could be joined in to the adjudication in any event. I consider that that conclusion, to the effect that Rule 4.90 envisaged a single and final ascertainment process, is consistent with the clear words of the Rule; consistent with Lord Hoffmann's reference to "a single account" in *Stein v. Blake*; and consistent both with the earlier decision of the Court of Appeal in *MS Fashions v. BCCI* [1993] 1 Ch 425 and the subsequent decision of the House of Lords in *Secretary of State for Trade and Industry v. Frid* [2004] 2 AC 506. In none of those authorities is a piecemeal, slice-by-slice approach suggested as being in any way appropriate for the taking of the account under Rule 4.90.
>
> 70. Thirdly, there is what I perceive to be a fundamental clash between the certainty and finality envisaged by the full Rule 4.90 process and, to use the vernacular, the temporary, quick-fix solution offered by construction adjudication under the Act. How can a decision that, if challenged, is of a temporary nature only, and would relate just to an element of the chose in action, have any role in or relevance to the taking of a final account under the *Insolvency Rules*?"

22. On behalf of Lonsdale, Mr Crangle argued that *Bouygues* and *Enterprise* were authority for the proposition that, if the claiming company is in insolvent liquidation, the adjudicator has no jurisdiction to deal with their contractual claim, because that claim ceased to exist at the liquidation, and was replaced by the net claim under what is now Rule 14.25 of the Rules. That argument was accepted by Fraser J.

3.2 Lonsdale's Concession

23. Before this court, Mr Crangle accepted that Bresco would have been entitled to bring their contractual claim by way of court proceedings. In addition, at paragraph 36 of

his skeleton argument, he conceded that Bresco could also have referred that same claim to arbitration, a concession which Mr Temmink QC also made on behalf of Cannon. In my view, this was an important concession, because it moved a considerable way towards accepting Bresco's proposition that the claim under the contract continued to exist; that it had not been extinguished or replaced on the occurrence of the liquidation.

24. Mr Arden QC for Bresco emphasised this concession to the court because he said it highlighted the crucial question: why was adjudication different? How could the claim under the contract legitimately be referred to arbitration pursuant to the relevant provisions in the contract, but could not be referred to adjudication pursuant to similar provisions in the contract dealing with adjudication? The concession meant that the answer to this question could *not* be that the contractual claim sought to be referred to adjudication was not a claim for the net balance under Rule 14.25, because that would be equally true of the claim if it had been referred to arbitration. Thus, there had to be something else which prevented an adjudicator from having jurisdiction, but which did not prevent an arbitrator from having the jurisdiction to deal with the same claim.

3.3 Bresco's Core Submission

25. The significance of this starting point became even more apparent during the submissions by Mr Arden QC (supported by the submissions dealing with insolvency issues in the *Cannon* appeal, from Mr Shaw QC, on behalf of Primus).

26. First, he referred to a number of older cases, including *Peat v Jones* (1881) 8 QBD 147; *Mersey Steel & Iron Co Ltd v Naylor Benzon & Co* (1882) 9 QBD 648 and *Langley Constructions (Brixham) Limited v Wells* [1969] 1 WLR 503, in support of the proposition that a party in liquidation can pursue its underlying claims in court, regardless of whether or not it was in liquidation. As I have said, this proposition was conceded both by Mr Crangle and Mr Temmink QC.

27. In addition, the passages in *Stein v Blake*, which I have set out at paragraph 18 above, were also the subject of further exposition. Mr Arden QC maintained that Lord Hoffmann was not there suggesting that the underlying claims cease to exist for all purposes: in fact, Lord Hoffmann expressly said, in the passage that I have highlighted, that they were deemed to continue to exist so that they could play their part in the underlying calculation of any net balance.

28. There can be no doubt that the language in *Stein v Blake* is not without its problems: that was illustrated by the fact that, in these appeals, all counsel could find support for their diametrically opposed propositions within Lord Hoffmann's speech. But, speaking for myself, Mr Arden QC and Mr Shaw QC demonstrated beyond doubt that the proving of a claim of the kind with which this case is concerned is not a process which was extinguished by the occurrence of the liquidation. Liquidation set-off does not, in principle, preclude the determination of the underlying claims.

3.4 The Remaining Issue

29. On that basis, the remaining issue on jurisdiction was a narrow one. If this claim would not have given rise to a jurisdictional issue in court or in arbitration, why did it give rise to such an issue if it was referred to adjudication? The answer, said Mr

Crangle (again supported by Mr Temmink QC) was that, if the contract claim was dealt with in court or by way of arbitration, the process would give rise to a final decision, whilst a claim in adjudication could only ever result in a decision that was temporarily binding. They said that such a process was not envisaged by Rule 14.25. Thus, they argued that the particular nature of the relief available in adjudication prevented an adjudicator from having any jurisdiction to consider a claim by a company in insolvent liquidation.

30. Although that is an issue that was touched on in some of the earlier authorities, what was novel about its presentation in this case was that it was said to be the *only* reason why an adjudicator (as opposed to the court or an arbitrator) did not have the necessary jurisdiction to decide a claim by a company in insolvent liquidation.

3.5 Analysis

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.

34. Of course, whether or not a process which gives rise to a decision which is temporarily binding provides a useful vehicle for claims made by a company in insolvent liquidation is an entirely different question, addressed in **Section 4** below. But that consideration cannot provide an answer to the hard-edged question of jurisdiction: either there is jurisdiction, or there is not.

35. So, for these reasons, it seems to me that HHJ Purle QC was right in *Philpott* to say that technically the adjudicator would have the jurisdiction to consider the claim advanced by a company in liquidation (paragraph 13 above). It also follows that, to the extent that I suggested in *Enterprise* that the application of the Rule itself gave rise to a jurisdictional bar, I was wrong to do so, although the main point in *Enterprise* on that part of the case arose out of the fact that, although the assigned claim was the claim for the net balance envisaged by the Rule, that was *not* the limited claim which had been referred to adjudication.

36. However, although the jurisdictional issue was the focus of the detailed submissions advanced by Mr Arden QC and Mr Shaw QC, I see it as only the beginning of the consideration of the issue on appeal, which is whether or not Fraser J was right to grant an injunction preventing the continuation of the adjudication. That leads directly onto the second issue in the *Bresco* appeal and focuses on 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.

4. Utility

4.1 The Basic Incompatibility of Adjudication and Insolvency

(a) Overview

37. I consider that there is a basic incompatibility between adjudication and the regime set out in the Rules. The former is a method of obtaining an improved cashflow quickly and cheaply. The latter is an abstract accounting exercise, principally designed to assist the liquidators in recovering assets in order to pay a dividend to creditors. Rule 14.25 envisages the taking of a detailed account as between the company and the creditor, and the careful calculation of a net balance one way or the other, or quantifying the company's net claim against a creditor. By contrast, adjudication is a rough and ready process which Dyson J (as he then was) said in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 was "likely to result in injustice". They are therefore very different regimes.

38. This incompatibility can be seen in the different processes that each regime entails; in a comparison of the results that may be available; and in a consideration of the wider issues that could arise if companies in insolvent liquidation regularly sought to refer claims to adjudication.

(b) The Process

39. The vast majority of claims which are referred to adjudication are not ostensibly claims for a net balance of the sort envisaged by Rule 14.25. Very often, the referred claim will form only a part of the overall claim which the company in liquidation may wish to make against the responding party; typically, the referred claim will simply be whichever claim has arisen at this particular stage of the construction contract. At best, therefore, such claims could only ever be a part of the necessary accounting exercise envisaged by Rule 14.25.

40. Take, by way of example, one of the most common types of claim referred to adjudication, where the contractor has a full entitlement to an interim payment because the employer has not served a pay less notice. It is trite law that in the absence of a pay less notice, the employer must pay the sum claimed, even if he has a legitimate cross-claim, either in respect of the true value of the work done, or by reference to other matters (defects, delay etc). In the circumstances I have outlined, the contractor's claim must be paid, and the cross-claim would have to be made in a subsequent adjudication.

41. So, in this example, if the contractor was in insolvent liquidation, its claim would not necessarily form any part of the proper calculation of the net balance under Rule

14.25; it would merely be a potential cashflow gain based on the employer's failure to serve a proper notice at a particular time. Furthermore, as already noted, the adjudicator's decision will only be temporarily binding (unless the parties agree otherwise or do not challenge it). That is not a condition or status expressly envisaged by Rule 14.25. That does not affect the jurisdiction question, but it is directly relevant to utility.

42. In my judgment in *Enterprise* I explained the fundamental incompatibility of the separate processes of adjudication and insolvency. I consider that, notwithstanding my answer to the jurisdiction question in **Section 3** above, those observations remain apposite.

(b) The Result

43. This incompatibility is also demonstrated by looking at what might happen if a company in insolvent liquidation was entitled to the sum found due by the adjudicator, but where the responding party has a cross-claim. As Chadwick LJ pointed out in *Bouygues* (paragraph 20 above), if Bouygues had to prove their claim in Dahl-Jensen's liquidation, it would only receive a dividend, and would be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim. Lonsdale would be exposed to precisely the same danger here if they sought to prove their own claim (paragraph 10 above) in Bresco's liquidation. For that reason, Chadwick LJ said that, ordinarily, summary judgment to enforce the adjudicator's decision would not be available. He only upheld the order for summary judgment in that case because the point had not been taken before the judge and he could achieve the necessary result by staying execution.

44. The point about the lack of utility of an adjudication involving a company in liquidation was also picked up by HHJ Purle in *Philpott*. In that case, at [30], he said:

> "The adjudication will produce at most a temporary obligation, more in the nature of an interim payment. However the contractual right to an adjudication is there. Whether or not the court would enforce any order against the company seems inconceivable, as this would defeat the requirement of *pari passu* distribution, and it may therefore that were the school to make an adjudication application, that might be met by an application for a stay by the liquidators on conventional insolvency grounds."

45. Accordingly, these authorities acknowledge that a decision of an adjudicator in favour of a company in liquidation, like Bresco, would not ordinarily be enforced by the court. HHJ Purle said such enforcement was "inconceivable"; that may put it too high but, in my view, judgment in favour of a company in insolvent liquidation (and no stay), in circumstances where there is a cross-claim, will only be granted in an exceptional case. Indeed, on behalf of Bresco, Mr Arden QC appeared to accept that either a refusal of summary judgment or a stay was the most likely outcome in such a situation.

46. As a result of this, I consider that Mr Crangle was right to say that 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"[2].

(c) Wider Considerations

47. In my view, there are also a number of wider considerations which again indicate the general incompatibility of adjudication and insolvency, and the futility of referring to adjudication claims by contractors in insolvent liquidation where there is a cross-claim.

48. First, a liquidator has, by definition, limited assets available to him or her with which to pursue the claims of the insolvent company. It would ordinarily be a waste of those limited assets to make a claim which could not be enforced or, at best, could only be enforced in exceptional circumstances.

49. I do not accept the idea that the adjudicator's decision might be of some use to the liquidator because it could somehow stand as a reduced proof amount (under Rule 14.11), or an estimate, or as some sort of assessment of the claim and cross-claim. The result of an adjudication is not the liquidator's best estimate of the value of a claim, but a sum found due by an adjudicator at a particular date, often based on the operation of the contractual payment provisions and the employer's failure to operate those provisions correctly. That may be far removed from the referring party's overall entitlement to recover, and the result would not be any kind of estimate or assessment of the parties' mutual debts.

50. Secondly, there are the costs incurred by the responding party. Why should a responding party have to incur the costs of defending an adjudication brought by a company in insolvent liquidation, when it knows that, even if it was unsuccessful in the adjudication, it would be able to resist summary judgment or enforcement as of right, although it would have to spend further sums to achieve that result? This would mean that the responding party was obliged to fund its (reluctant) role in a futile process. That must be wrong in principle.

51. Thirdly, even if we assume that the company in insolvent liquidation is successful in the adjudication and that, for whatever reason, summary judgment is granted, the responding party would then have to bring its own claim in court to overturn the result of the adjudication. That would require yet more costs to be incurred by the responding party to regularise its position and recover the sums due from a company in insolvent liquidation. The obvious risks would be that any recovery may be rendered difficult or impossible by the liquidation, and that further costs would be lost in any event. Security for costs would not be available (because on this basis the responding party would be the claimant). Again, that seems to me to be wrong as a matter of principle.

52. Finally, there is the question of the court's resources. If Mr Arden QC was right, so that companies in insolvent liquidation could commence and run adjudication proceedings all the way through to enforcement proceedings, to see how things might

[2] At paragraph 27 of his skeleton argument, Mr Crangle submitted that "it would be an exercise in futility to allow the adjudication to proceed any further when there is no prospect of it producing a decision capable of being enforced".

turn out at that stage, there would be an increase in the number of enforcement applications, and a further strain on the already overburdened resources of the TCC. It would have an adverse effect on other court users, including those companies who have organised their affairs in such a way that they are not in insolvent liquidation.

53. Early in his oral submissions, Mr Arden QC said that "the way you make insolvency and adjudication work together is by way of enforcement". It follows from my analysis that I disagree with that proposition: in the ordinary case where the claiming party is in insolvent liquidation, the difficulties and wasted costs of using adjudication to arrive even at the enforcement stage – let alone the costs and possible complexities of enforcement itself – make plain that the two regimes are incompatible from the outset.

(d) Summary

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.

4.2 Solution to the Incompatibility Problem

55. In my view, the solution to the incompatibility issue is the one that was adopted in the present case: the grant of an injunction to restrain the further continuation of the adjudication. *Twintec* (paragraph 13 above) is authority for the proposition that the court will grant such an injunction if the court concludes that the nascent adjudication is a futile exercise.

56. This is an important power in the context of adjudication. Adjudication is a quick process which can require a responding party to spend a good deal of money in a short space of time, to defend itself from claims which may prove to be utterly hopeless, yet with no prospect of recovering those costs (because adjudication is cost-neutral). It is therefore important that, whatever the theoretical jurisdiction position may be, a responding party has the right to try and put a stop to the adjudication process at an early stage. Of course, whether or not the court will grant an injunction will depend on the facts of each case.

57. Paragraphs 23 and 27 of Mr Crangle's skeleton argument explain why (regardless of jurisdiction) the utility argument justified the grant of the injunction in this case. It was a submission which he repeated orally. The only relevant point in response made in the written submissions on behalf of Bresco was at paragraph 45, where Mr Arden QC accepted that the adjudication in the *Bresco* appeal may involve "assessment without enforcement". His oral submissions focussed on the jurisdiction arguments; on the utility question, he suggested that the adjudication should be permitted to go ahead, and that "if the adjudicator could not arrive at a net balance, or it appears that a party can take the matter further, then these eventualities can be dealt with by not granting summary judgment or by imposing a stay".

58. In my view, this latter submission was not an answer to the utility argument in the present case, because it ignored *Bouygues*. Lonsdale have a cross-claim, so they are in precisely the same position as Bouygues, with a complete defence to any claim for summary judgment, and/or a clear entitlement to a stay.

59. As to the assessment argument, Mr Arden QC made much of the fact that the result of the adjudication might prove useful to Bresco's liquidator, even without enforcement, because it would (or might) comprise an assessment of the net balance, I have rejected that submission in paragraph 49 above. In any event, this would require the responding party to participate in the adjudication and incur the costs of mounting its own cross-claim, just so that the liquidator can see what a net, non-binding result might look like. In circumstances where the liquidator would be unlikely to use litigation or arbitration for this exercise, because of the costs exposure, and/or in circumstances where the responding party would otherwise let its cross-claim lie because of the claiming party's insolvency, it would be an abuse of the cost-neutral adjudication regime to use it as a cheap assessment service, knowing that enforcement could never happen.

60. There is nothing in the facts of the present case that was relied on by Bresco, either before Fraser J, or before this court, which takes this case out of the ordinary, or which demonstrates that it is just or convenient for the underlying adjudication to continue. On the contrary, all the evidence points the other way. Bresco had been in insolvent liquidation for over 3 years before they referred their claim to adjudication. There is no evidence that Bresco will 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 have not pursued Bresco, doubtless because of Bresco's insolvency. There is no good reason to make Lonsdale now incur the costs of defending a claim in adjudication which cannot be enforced.

61. Accordingly, for these reasons, Lonsdale were entitled to an injunction to prevent the continuation of the adjudication.

5. Outcome of the Bresco Appeal

62. For the reasons that I have given, I consider that Fraser J was wrong to find that the adjudicator had no jurisdiction to consider this claim. It therefore follows that, to the extent that I reached the same conclusion in *Enterprise*, I too was wrong. I consider that Bresco's right to refer a dispute to adjudication was not automatically lost when they went into liquidation.

63. However, I consider that the theoretical existence of the adjudicator's jurisdiction is only the start of the analysis. In the circumstances of this case, an adjudicator's decision in favour of Bresco, a company in insolvent liquidation facing a separate cross-claim, will not be capable of being enforced. That would make the adjudication an exercise in futility. In accordance with *Twintec*, an injunction was therefore appropriate. There was no reason why this adjudication should have been permitted to continue; on the contrary, it was just and convenient to grant the injunction. Accordingly, I would uphold the decision of Fraser J, not on the grounds of theoretical jurisdiction, but on the grounds of practical utility.

6. Cannon v Primus: The Facts

64. The factual background in the *Cannon* appeal is more complicated. However, it is necessary to set out the facts in some detail because, in my view, they go a long way towards explaining why Judge Waksman QC reached the conclusions that he did.

65. Pursuant to a contract dated 5 May 2015, Cannon engaged Primus to design and build a new hotel at 10, Albert Embankment in London. On 26 July 2016, 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, on 11 August 2015, Cannon served a notice of termination and ordered Primus to leave site that same day, which it did. Each side alleged that the other was in repudiatory breach of contract and the dispute was referred to what became the second adjudication between the parties.

66. In a decision dated 2 November 2016, the well-known adjudicator, Dr Christopher Thomas QC, held that Primus were not in repudiatory breach of contract but that Cannon were. Although two years have passed since he produced his decision, and Cannon have always said that they disagree with it, this remains the only determination of the central issue between the parties.

67. Twelve days later, at the conclusion of the third adjudication, Dr Thomas QC held that Cannon was liable to pay Primus £222,542.17 arising out of the payment notice served in July (paragraph 65 above). That sum was not paid, contrary to Cannon's contractual obligation to pay any sums found due by the adjudicator.

68. On 10 January 2017, Primus issued court proceedings in the TCC, claiming damages for repudiatory breach of contract, together with the unpaid sum due as a result of the third adjudication. The following day, 11 January, Primus sought and obtained an *ex parte* basis a Freezing Order up to a value of £750,000. The validity of that order has never been challenged, although subsequently Cannon agreed to give an undertaking to the same effect. That undertaking has subsequently been varied and Cannon's current undertaking to the court is that it will not dissipate or otherwise deal with the hotel at Albert Embankment in a way which would reduce its value below £2.7 million.

69. At the time of the hearing before the Court of Appeal, that litigation remained ongoing. In it, Cannon made their own claims for repudiatory breach of contract, defects, and other matters.

70. On 27 July 2017, Primus entered into a CVA. The directors' proposal for a CVA was made on the basis that, although Primus was currently insolvent, there was a clear way forward that would ultimately lead to the creditors receiving 100 pence in the £1, as opposed to nothing in the event of a liquidation. The reason for this positive prognosis was that Primus considered that they would be able to make very significant recovery from third parties (including Cannon) by way of litigation and adjudication, sufficient to satisfy all its creditors.

71. It is unnecessary to set out the detailed terms of the CVA. It is common ground that the CVA referred expressly, amongst other things, to Rule 14.25 of the current Rules.

72. It is to be noted that, just after the CVA commenced, Cannon applied to the Companies Court to revoke the decision which had approved the CVA, and for an

order that it should be treated as a person entitled to vote at any relevant qualifying decision procedure. Subsequently, in January 2018, Cannon discontinued that application. Judge Waksman QC found at [34] that one reason for the withdrawal of the application was because of the "very detailed witness statement" provided by Primus dealing with all aspects of Cannon's contentions and the underlying logic of the CVA. Judge Waksman QC went on to say that he suspected that Cannon's application had been "something of a tactical device", a view with which I agree.

73. On 8 March 2018, Primus referred to adjudication its claim for the damages caused by the repudiatory breach of contract found by Dr Thomas QC[3]. This was called the fourth adjudication. Mr Matt Molloy, the adjudicator, went through the claims in detail and identified a net sum due to Primus of £2.128 million, plus interest. In arriving at that sum, Mr Molloy addressed, and almost entirely rejected, the cross-claims raised by Cannon. He allowed only a small sum relating to deposits which Cannon had paid twice.

74. Meanwhile, back in the litigation (paragraph 68 above), not very much was happening. Primus were focusing on their claims for damages in the fourth adjudication, and Cannon did not appear to be overly anxious to prosecute their own cross-claims. When they did take a step in the litigation, it rebounded on them. Thus, in May 2018, they made an unsuccessful application for security for costs. In refusing to make the order sought, O'Farrell J noted that Primus "has at present a very strong case that its financial difficulties have been caused in large part by [Cannon's] wrongful termination… I am conscious of the fact that in 2016 a company reorganisation took place which may of course provide the answer both in terms of fall in turnover and the change from profit to loss… In those circumstances Mr Williamson has a strong case that the court should be very reluctant to exercise its discretion in favour of ordinary security for costs".

75. On 21 May 2018, Primus commenced these (separate) proceedings to enforce the decision of Mr Molloy in their favour in the fourth adjudication, in the sum of £2.128 million odd. On 21 June, Cannon expressly accepted in writing that summary judgment could be entered against them, but sought a stay of execution.

76. On 6 July, Cannon changed their mind and said that they wanted to withdraw the concession that there should be summary judgment. However, a week later, on 13 July, their solicitors wrote again to the TCC, reinstating the concession, and expressly confirming that they would not be contesting Primus' entitlement to summary judgment. That position was then maintained in a skeleton argument prepared by leading counsel then instructed, and at the hearing itself on 17 July 2018.

77. However, when Judge Waksman QC was considering his reserved judgment after the conclusion of the hearing, he found the decision of Akenhead J in *Westshield Limited v Whitehouse* [2013] EWHC 3576 (TCC) which he thought might be relevant. In consequence, he invited further written submissions from the parties and there had to be a further hearing on 26 July 2018. For a second time, Cannon sought to withdraw their concession that summary judgment could be entered, this time on the basis of the decision in *Westshield*. The judge allowed Cannon to withdraw their concession.

[3] Since the parties have a right to refer a dispute to adjudication 'at any time', it has long been established that this allows a party to refer a dispute to adjudication even if it is also the subject of ongoing litigation.

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.

79. It is clear from the judgment that the only argument Cannon raised as to why there should not be summary judgment was based on the decision of Akenhead J in *Westshield*. That was a case about a company in a CVA where summary judgment was not granted. Judge Waksman QC, in his usual way, carefully analysed *Westshield* and concluded that Akenhead J was not saying that, merely because a company is in a CVA, summary judgment should be refused. The relevant passages in his judgment begin at [91]:

> "91. For all of those reasons it cannot be said, adopting the observations of Chadwick LJ, as echoed by Akenhead J, that summary judgment is always to no advantage to a party because inevitably there will be a netting-off exercise taking account of the counterclaim. Where both parties are already in litigation, where the claims and counterclaims have already been advanced or will be advanced, where the supervisor has already taken the view and considered that Cannon is no longer a creditor, a different situation applies. If Primus is the net winner in the litigation it will recover money from Cannon. It will distribute it to its creditors. If Cannon is the net winner it will, in effect, have to prove for its net claim in the CVA. Precisely the same result would obtain had there been no litigation but only a supervisor's exercise of the netting-off. So although there is no evidence directly from the supervisor as to what he would do, it seems to me to inconceivable there will be any kind of netting-off exercise here unless it is simply a repetition of the view which the supervisor has already taken. The supervisor, of course, had to approve the litigation both in relation to the adjudication enforcement and the separate substantive proceedings.
>
> 92. Moreover one should not be distracted by the issue of a counterclaim. If there was no counterclaim but the defendant simply wished to challenge the adjudicator's decision there is no reason why the mere fact of a CVA should mean there can be no summary judgment.

> 93. Accordingly I do not accept that *Westshields* is authority for the proposition that whenever the claimant with an adjudication decision is in a CVA and there is a counterclaim, it must follow without more that there should be no summary judgment. Nor, in my judgement, did Akenhead J purport to lay down any such general rule.
>
> 94. It is also worth noting, though I accept it is a minor point, that part of the thinking of Akenhead J when deciding what to do involved the rejection of the argument to the effect that the adjudication there had been statutorily imposed. This seems to indicate that this was a factor he took into account.
>
> 95. Furthermore, Akenhead J did not disapprove of *Mead* and if he was really laying down a rule of general application he would have had to say something more, because on this view of *Westshields*, one would never get to the stage of stay of execution in a CVA where there is a counterclaim at all and yet *Mead* is all about stays of execution in connection with counterclaims. If Akenhead J took the view that he was laying down that kind of general rule, he would have been bound to say something about *Mead* and certainly would have had to qualify it or disagree with it.
>
> 96. Furthermore, in *Mead* itself, although the point was not specifically raised, and it is right to say there was no defendant there, Coulson J when considering the observations he made, would surely have been aware that it is a standard provision in CVAs that there would be a netting-off clause. I cannot say there was one in *Mead* because the report does not make that clear but it would seem likely that there would have been.
>
> 97. There is nothing in any of the other cases which have been cited to me, either originally or following the adjournment, that is inconsistent with this result. There is therefore no procedural bar to summary judgment here. Nor does it follow that there must be a stay of execution without more, which depends upon the same reasoning."

80. That analysis then led on to Judge Waksman QC's consideration of the application by Cannon for a stay of execution. The judge referred to the list of principles taken from the earlier authorities and summarised in *Wimbledon Construction Company 2000 Limited v Vago* [2005] EWHC 1086 at [26]:

> "26. In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:

> a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
>
> b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
>
> c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see *AWG Construction Services v Rockingham Motor Speedway* [2004] EWHC 888).
>
> d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see *Herschell Engineering Ltd v Breen Property Ltd* (unreported) 28 July 2000, TCC).
>
> e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522 (CA) and *Rainford House Ltd v Cadogan Ltd* (unreported) 13 February 2001).
>
> f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:
>
> (i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see *Herschell*); or
>
> (ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see *Absolute Rentals v Glencor Enterprises Ltd* (unreported) 16 January 2000, TCC).”

81. The issue for Judge Waksman QC was whether, by reference to paragraph 26(f)(ii) of the *Wimbledon* summary, Primus’ financial position was due, either wholly or in significant part, to Cannon’s repudiation and failure to pay the relevant sums. That had of course been the view of O’Farrell J when she refused Cannon’s application for security for costs. Judge Waksman QC had no hesitation in reaching the same view,

and for that principal reason, he did not grant a stay. The summary of his views on the application for a stay can be found at [120] as follows:

> "It has to be recognised that when considering the cause of financial difficulties the court (rather like its consideration of a similar argument in the context of security for costs), has necessarily a somewhat imperfect picture. There has been no trial and no cross-examination of witnesses, and clearly the court has to the best it can on the circumstances. But having done so here, and with the numerous materials which are available to me, I have no doubt at all for the present purposes that the repudiation did not cause the CVA and it did cause the present financial predicament of Primus. Or at least, and I need go no further than this, that it did so in significant part."

7. Waiver

82. Of course, for the reasons set out in **Section 3** above, I have concluded that, as a matter of jurisdiction, the contractual claim of an insolvent contractor continues to exist following liquidation, and so may theoretically be referred to adjudication. That therefore means that Cannon's jurisdiction argument – which was the same in principle as that advanced by Lonsdale in the *Bresco* appeal – must fail. But I have also concluded that this point was not properly open to Cannon in any event. Although it is not always appropriate for this court to decide an issue which, for other reasons, has become redundant, I have concluded that, in this instance, it is appropriate to set out my views as to why I consider that, on behalf of Primus, Mr Williamson QC was right to say that Cannon had waived their right to run the jurisdiction point in any event. Arguments about waiver and general reservations of position arise much more often in adjudication cases than they should. It may therefore be useful to set out what I consider to be the applicable principles.

83. The older decisions concerned with general reservations of position, albeit not in an adjudication context, are both at first instance. In *The Marques de Bolarque* [1984] 1 Lloyd's Rep 652, the respondent to an arbitration had written at the time of the nomination of an arbitrator by the claimant to say that, "without prejudice to such rights as owners may have", they too were nominating an arbitrator. Hobhouse J held that those general words were a sufficient reservation of the right to object to the jurisdiction of the arbitrator and so did not confer a jurisdiction on the arbitrators which he did not otherwise have. In *Allied Vision Limited v VPS Film Entertainment GmbH* [1991] 1 Lloyd's Rep 392, Potter J followed the same approach, noting that "subsequent participation in the arbitration under the umbrella of the original reservation will not, without more, amount to a waiver or ad-hoc submission".

84. The law in relation to general reservations has proved particularly controversial in adjudication, because of the short time frame, and the policy behind the 1996 Act, which Chadwick LJ described as one whereby 'the importance of obtaining the right answer has been subordinated to the need to have an answer quickly'[4]. The courts have been anxious to ensure that the purpose of the 1996 Act is not defeated by the

[4] *Carillion Construction Ltd v Royal Devonport Dockyard Ltd* [2005] EWCA (Civ) 1358; [2006] BLR 15, at paragraph 86.

taking of technical points, including the use of general reservations of position on jurisdiction as a means of allowing novel jurisdiction points to be taken by the losing party at the enforcement stage. This can be seen in a number of cases.

85. In *Allied P & L Limited v Paradigm Housing Group Limited* [2009] EWHC 2890 (TCC); [2010] BLR 59, Akenhead J said:

> "32. It has long been established in the relatively short period of time in which the Housing Grants Construction and Regeneration Act 1996 ("HGCRA") has been in force that it is necessary for a party challenging the jurisdiction of the adjudicator to reserve its position in relation to its challenge; for instance, although not cited in argument, this issue was raised and commented upon by Mr Justice Dyson as he then was in *The Project Consultancy Group v The Trustees of the Gray Trust* [1999] BLR 377 at Paragraphs 14 and 15. Having reserved its position appropriately and clearly, that party can safely continue to participate in the adjudication and then, if the decision goes against it, to challenge its enforceability on jurisdictional grounds in the Court. If it does not reserve its position effectively, generally it cannot avoid enforcement on jurisdictional grounds…It is however difficult to envisage circumstances in which a jurisdictional challenge on the grounds that there is no dispute should not and can not be the subject of a reservation of rights."

86. In *GPS Marine Contractors v Ringway Infrastructure Services* [2010] EWHC 283 (TCC), Ramsey J dealt in detail with general reservations and said:

> "37. The underlying issue is whether, taking account of the particular reservation, a party by participating in the adjudication has waived its right to object on grounds of jurisdiction. If the party does not raise any objection and participates in the adjudication then, even if there is a defect in the jurisdiction of the adjudicator, that party will create an *ad-hoc* jurisdiction for the adjudicator and lose the right to object to any decision on jurisdictional grounds. If a party raises only specific jurisdictional objections and those jurisdictional objections are found by the court to be unfounded then that party is precluded from raising other grounds which were available to it, if it then participates in the adjudication. That participation amounts to a waiver of the jurisdictional objection and confers *ad-hoc* jurisdiction. Obviously this assumes that, at the relevant time when the party participated in the Adjudication, the jurisdictional objection was available. Some jurisdictional objections, for instance as to the scope of the dispute, may only become apparent during the adjudication process or at the time of the decision.
>
> 38. Where a party raises a general reservation to the jurisdiction of an adjudicator but does not specify any particular ground for

> such an objection that raises potential difficulties for both the adjudicator and the other party. The adjudicator cannot investigate any specific objection and, if appropriate, decide not to proceed. The other party cannot decide whether any specific objection has merit. If so it might decide whether to take steps to remedy the situation by, for instance, starting a new adjudication. Equally, if a general reservation as to jurisdiction were to be sufficient to cover all matters that had arisen or might arise then there would, in principle, be no need for any specific objection, except to give the other party and the adjudicator a chance to consider it.
>
> 39. Those practical difficulties suggest that the use of general reservations is undesirable but that does not answer the question whether a general jurisdictional reservation does permit a party to participate in an adjudication without thereby waiving its right to objection on jurisdictional grounds. The decision in ***Bothma*** provides strong support for the effectiveness of a general reservation. In addition in the context of arbitration, prior to the provisions of s.73 of the Arbitration Act 1996, a general reservation was held to the sufficient to preserve objection to jurisdiction by a party who participated in an arbitration. ..."

87. Then, having referred to both the *Marques de Bolarque* and *Allied Vision*, Ramsey J went on:

> "41. I respectfully adopt that approach which seems to me to be equally applicable in the case of adjudication. The question in this case is therefore, whether the words of general reservation were sufficiently clear to prevent Ringway's subsequent participation in the adjudication from amounting to a waiver or an *ad-hoc* submission..."

He then found that the particular words used in the letters in that case, when construed in their context, amounted to a proper reservation on jurisdiction. He reached a similar view (albeit with hesitation) in *Laker Vent Engineering Ltd v Jacobs E&C Ltd* [2014] EWHC 1058 (TCC).

88. In *Aedifice Partnership Limited v Ashwin Shah* [2010] EWHC 2106 (TCC), Akenhead J said:

> "21. I can draw these various strands together:
>
> …
>
> (b) For there to be an implied agreement giving the adjudicator such jurisdiction, one needs to look at everything material that was done and said to determine whether one can say with conviction that the parties must be taken to have agreed that the adjudicator had such jurisdiction. It will have to be clear that

> some objection is being taken in relation to the adjudicator's jurisdiction because otherwise one could not imply that the adjudicator was being asked to decide a non-existent jurisdictional issue which neither party had mentioned.
>
> (c) One principal way of determining that there was no such implied agreement is if at any material stage shortly before or, mainly, during the adjudication a clear reservation was made by the party objecting to the jurisdiction of the adjudicator.
>
> (d) A clear reservation can, and usually will, be made by words expressed by or on behalf of the objecting party. Words such as "I fully reserve my position about your jurisdiction" or "I am only participating in the adjudication under protest" will usually suffice to make an effective reservation; these forms of words whilst desirable are not absolutely essential. One can however look at every relevant thing said and done during the course of the adjudication to see whether by words and conduct what was clearly intended was a reservation as to the jurisdiction of the adjudicator. It will be a matter of interpretation of what was said and done to determine whether an effective reservation was made. A legitimate question to ask is: was it or should it have been clear to all concerned that a reservation on jurisdiction was being made?
>
> (e) A waiver can be said to arise where a party, who knows or should have known of grounds for a jurisdictional objection, participates in the adjudication without any reservation of any sort; its conduct will be such as to demonstrate that its non-objection on jurisdictional grounds and its active participation was intended to be and was relied upon by the other party (and indeed the adjudicator) in proceeding with the adjudication. It would be difficult to say that there was a waiver if the grounds for objection on a jurisdictional basis were not known of or capable of being discovered by that party."

89. In the subsequent decision of *CN Associates (a firm) v Holbeton Limited* [2011] EWHC 43 (TCC); [2011] BLR 261, Akenhead J referred to the authorities noted above, and in particular his own summary in *Aedifice*. He went on:

> "33. There is little to add to these observations. If a party does not effectively reserve its position on a given jurisdiction issue, of which it had actual or constructive knowledge, it cannot raise it as an effective objection to a claim for the enforcement of the relevant adjudication decision..."

90. Finally, in *Equitix ESI CHP (Wrexham) Limited v Bestor Generacion UK Limited* [2018] EWHC 177 (TCC), I referred to these cases and said:

> "*Allied P&L* is important because the responding party took various points on jurisdiction, each of which failed. Although

> they subsequently discovered a much better argument on jurisdiction, because they had not previously referred to it, or reserved their position in respect of it, the court found that they could not rely on it subsequently to resist enforcement. By contrast, a general reservation of position can, depending on the circumstances, be effective, as Ramsey J found (with some hesitation) in *Laker Vent Engineering*... However it all depends on the facts: the court will usually look with disfavour on an unspecific general reservation of the responding party's position on jurisdiction if it thinks that it was worded in that way to try and ensure that all options (including ones not yet even thought of) could be kept open."

91. In my view, the purpose of the 1996 Act would be substantially defeated if a responding party could, as a matter of course, reserve its position on jurisdiction in general terms at the start of an adjudication, thereby avoiding any ruling by the adjudicator or the taking of any remedial steps by the referring party; participate fully in the nuts and bolts of the adjudication, either without raising any detailed jurisdiction points, or raising only specific points which were subsequently rejected by the adjudicator (and the court); and then, having lost the adjudication, was allowed to comb through the documents in the hope that a 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. To that extent, therefore, I consider that the position in adjudication is rather different to that in arbitration, and, unlike Ramsey J, I am not persuaded that the reasoning in *The Marquess de Bolarque* and *Allied Vision* is of direct application to the general reservation of a responding party's position as to an adjudicator's jurisdiction.

92. In my view, informed by that starting-point, the applicable principles on waiver and general reservations in the adjudication context are as follows:

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*).

93. In the present case, Cannon's solicitors emailed the adjudicator on 17 March 2018, noting the agreed timetable for the adjudication going onto say "…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".

94. Pausing there, it seems to me that that reservation of position was so vague - perhaps deliberately so - as to be ineffective. It appears to suggest that Cannon might wait before unleashing a jurisdictional objection in "other proceedings", namely after the adjudication and at the enforcement stage. That is precisely the sort of approach to adjudication which, in my view, the courts should be vigilant to discourage.

95. On 20 March 2016, Cannon's solicitors wrote again, repeating the general reservation of rights but then going on to raise two specific challenges to the adjudicator's jurisdiction. One involved an allegation against Primus that they had cherry-picked parts of the account in their claim, and the other was the suggestion that the dispute had not crystallised before it had been referred to adjudication. The adjudicator rejected both of those points and they were not subsequently raised again before Judge Waksman QC.

96. At no point during the fourth adjudication did Cannon raise the argument that Mr Molloy did not have the necessary jurisdiction because Primus were the subject of a CVA. Neither did that point arise in front of Judge Waksman QC. On the contrary, the argument at the hearing was all about the stay of execution which Cannon were seeking, until the belated reference (by the judge) to the decision in *Westshield*. Although Mr Temmink QC suggested that the jurisdiction point was in play before Judge Waksman QC, it is plain on any fair reading of his judgment that it was not. Indeed, at [72], the judge said:

> "72. An argument put forward by Cannon at the hearing was that where a CVA contained a set-off provision, like that under the Insolvency Rules, as this one did, then the case precisely analogous to *Bouygues* and there should be a stay. I did ask then ask why, in that case there was no submission that there should be no judgment at all. I was told that while that was a course which Cannon could have been taken it had decided not to. In the event, for the reasons I have explained, that point has now been taken by Cannon because I allowed it to do so."

97. It seems to me that that exchange, as recorded in the judgment, makes plain that at no time before the judge were Cannon taking any jurisdiction point at all, let alone one based on the fact of the CVA. Had they been doing so, of course, Cannon would have

objected to any order for summary judgment at the outset of the proceedings. Instead, even at the principal hearing, they accepted that summary judgment could be entered.

98. On appeal, therefore, Cannon are seeking to raise a specific jurisdiction point for the first time. Indeed, their application for permission to appeal was expressly based on that premise: they sought "permission to raise a new point of law, namely that summary judgment should not have been granted because the adjudicator did not have jurisdiction to make the adjudication decision…".

99. In my view, applying the principles to which I have referred at paragraph 92 above, Cannon cannot now be permitted to rely on their original general reservation of position in order to be able to raise this objection. Any proper jurisdictional objection was limited to the two points which the adjudicator decided against Cannon and which have (rightly) not been resurrected. The general reservation was too vague to be effective; in any event, it must be regarded as having been superseded by the two specific objections that were raised and which failed. Moreover, it cannot be said that Cannon did not know or should not have known about the argument that an adjudicator may not have the necessary jurisdiction to decide a claim by an insolvent company: *Enterprise* was decided and reported in 2010 and Cannon were represented throughout either by a specialist QC or experienced solicitors or both. Cannon must therefore have been taken to have waived any jurisdictional objection other than those specifically raised and rightly rejected.

100. Accordingly, had there been anything in the jurisdiction argument (which, for the reasons set out in **Section 3** above, I reject) then, whilst the point was always open to Bresco because of the way in which it arose 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 knew or should have known about the point) and the general reservation did not cover it and was subsumed by the specific objections in any event.

8. Discretion

8.1 Summary Judgment

101. The next question is whether Judge Waksman QC was wrong to enter summary judgment against Cannon for the £2.128 million odd found due by Mr Molloy in the fourth adjudication.

102. Cannon's argument is simply stated. They refer to paragraph 33 of the judgment of Chadwick LJ in *Bouygues* where he said that, because of Dahl-Jensen's insolvency, "there is a compelling reason to refuse summary judgment". They then argue that the mere fact that Primus were in a CVA rather than insolvent liquidation was not a reason to distinguish *Bouygues*, particularly as the CVA made an express reference to Rule 14.25. Then, prompted (at least originally) by the judge's research, Cannon rely on paragraph 28 of Akenhead J in *Westshield* where, having identified the particular CVA conditions in that case, he said:

> "28. In my judgment, the position is exactly analogous to what was being addressed by Lord Justice Chadwick in the *Bouygues* case, although his reasoning was related to the direct impact of

> the Insolvency Act and Rules. That in reality involves a distinction without a difference in the current case. The reason is that the Company and the Whitehouses as arguable creditors are bound by the CVA Conditions. To borrow from the wording of his judgment:
>
> (a) The effect or "incident" of Condition 23 (e) is that "claims and cross-claims merge and are extinguished; so that, as between the insolvent and the other party, there is only a single claim - represented by the balance of the account between them".
>
> (b) "In those circumstances it is difficult to see how a summary judgment can be of any advantage to either party where, as [Condition 23(e)] make[s] clear, the account can be reopened at some stage".”

103. In my view, *Bouygues* is of little assistance on this issue, partly because the point did not arise directly, and partly because summary judgment had been granted there anyway, and that was not set aside on appeal. Furthermore, Dahl-Jensen were in insolvent liquidation, not a CVA. Of considerably more significance is *Westshield*.

104. I consider that Cannon’s submissions ignore the detailed analysis of the decision in *Westshield* by Judge Waksman QC. Although I have set out the final part of his analysis (para 79 above), it is worthwhile noting that he addressed *Westshield* at length in his judgment from [73] to [97]. In those paragraphs, he distinguished the present case from *Westshield* for a number of different reasons. In particular, he noted that, whilst in *Westshield*, summary judgment would have interfered with the CVA process, that was not the case here.

105. It is unnecessary for the purposes of this appeal to set out all the reasons why Judge Waksman QC concluded that the decision in *Westshield* did not mean that summary judgment could not be entered in this case. But it is instructive to take one example from [87]:

> “What I do <u>not</u> read from that decision is that wherever there is a purported counterclaim and a CVA it must follow that there can be no summary judgment. For example, take this case. The adjudicator has in effect already considered both claim and counterclaim and both parties have agreed to litigate the matter as effectively the step which is going to be required in any event in order to achieve finality. In those circumstances, whatever else may be said about the CVA, it is impossible to see how or why the supervisor would wish to undertake some yet further consideration of the claim and counterclaim. There would be absolutely no point because (a) it is all going to end up in the current litigation anyway and (b) the supervisor here has, as it seems to me on the evidence, already adopted the result of the adjudication as against Cannon, to say that it was not a creditor. This, of course, is in circumstances where the

> entire purpose of the CVA was to make recovery of all sums owed to it by litigation if necessary."

I respectfully agree with that analysis and that conclusion.

106. It was not suggested by Mr Temmink QC that Judge Waksman QC's detailed analysis of the CVA in the present case was wrong. The judge was entitled to distinguish *Westshield* on the facts, and to conclude that this was a case where summary judgment could be granted in favour of Primus.

107. More generally, of course, it must be remembered that, on two separate occasions, Cannon had expressly conceded that summary judgment was indeed the right result. Cannon were only allowed to rescind their concession a second time because of the judge's discovery of the *Westshield* case.

108. In addition, it seems to me that the general position relating to a CVA may, depending on the facts, be very different to a situation where the claimant company is in insolvent liquidation. In the latter case, claims being made by the company are part of what might be called a damage limitation exercise, whereby the liquidators endeavour as best they can to pay dividends to creditors. A CVA is, or can be, conceptually different. It is 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 may be an extremely useful tool to permit the CVA to work. In those circumstances, courts should be wary of reaching any conclusions which prevent the company from endeavouring to use adjudication to trade out of its difficulties. On one view, that is what adjudication is there for: to provide a quick and cheap method of improving cashflow.

109. Accordingly, for all these reasons, I consider that, had it remained live, the appeal against the judge's decision to grant summary judgment in favour of Primus would have failed.

8.2 Stay of Execution

110. The final point on the appeal was Cannon's submission that the judge erred in refusing the stay of execution. On my analysis, if it was open to the judge to grant summary judgment (which for the reasons set out above, I conclude that it was) then, on the particular facts of this case, the refusal of the application for a stay was almost inevitable.

111. There are a number of reasons for that. First, I note that that is the thrust of the first instance authorities. In *Westshield*, Akenhead J said expressly that, if he had permitted summary judgment to be granted, he would not have granted the stay. Furthermore, in the earlier case of *Mead General Building Ltd v Dartmoor Properties Ltd* [2009] EWHC 200 (TCC), I found in principle that:

> "12. There is, so far as I can tell, no authority dealing with the position of a claimant who is the subject of a CVA and who seeks to avoid a stay of execution. Ms. McCafferty was also unable to identify any such authority. However, it seems to me that, applying the principles that I have already noted:

> (a) The fact that a claimant is the subject of a CVA will be a relevant factor for the court to take into account when deciding whether or not to grant a stay under RSC Order 47.
>
> (b) However, the mere fact of the CVA will not of itself mean that the court should automatically infer that the claimant would be unable to repay any sums paid out in accordance with the judgment, such that a stay of execution should be ordered.
>
> (c) The circumstances of both the CVA and the claimant's current trading position will be relevant to any consideration of a stay of execution.
>
> (d) Also of relevance will be the point noted in paragraph 26(f)(ii) of the judgment in *Wimbledon* (which was also one of the live issues in *Michael John Construction Ltd. v. Golledge & Others*) [2006] EWHC 71 (TCC)), namely whether or not the claimant's financial position and/or the CVA is due, either wholly or in significant part, to the defendant's failure to pay the sums awarded by the adjudicator."

112. Secondly, I consider that, 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. The CVA was not a reason to refuse the stay: indeed, a stay would have run the risk of preventing the successful conclusion of the CVA. Again, that was the position in *Mead*:

> "19. In summary, therefore, I find that:
>
> (a) Mead's financial troubles have been directly caused by Dartmoor's failure to pay the sums found by the adjudicator to be due. Mead were too small a business to be able to withstand losses of the magnitutde created by Dartmoor.
>
> (b) The CVA was the result of Dartmoor's failure to pay the sums due.
>
> (c) It is evident that the supervisor of the CVA believes that Mead are a viable ongoing concern and who can trade their way out of their difficulties.
>
> (d) Mead are currently trading successfully, and there is no reason to believe that they would not be in a position to pay back any part of the judgment sum if, in a subsequent arbitration, the arbitrator concluded that they had been overpaid."

113. In those circumstances, the argument about the stay of execution in the present case turned on the application of the principle at paragraph 26(f)(ii) from the summary in *Wimbledon v Vago*. A court will exercise its discretion against a stay if it concludes that the party seeking the stay is responsible, either wholly or in substantial part, for

the claimant's financial difficulties. In the present case, that was the conclusion reached. That was the view of O'Farrell J in this case on the unsuccessful application for security for costs. And on the application before Judge Waksman QC, he analysed the figures in detail and reached precisely the same conclusion (see paragraph 81 above).

114. Accordingly, it was plainly open to the judge in the present case to exercise his discretion against granting a stay of execution. In my view, on the facts of this case, having decided that he could enter summary judgment in favour of Primus, the refusal of the stay was almost inevitable. Had it remained live, the appeal against the refusal to grant the stay would also have been refused.

9. Outcome of the Cannon Appeal

115. For the reasons set out in **Section 7** above, I consider that if (which I do not accept) there had been anything in the jurisdiction point, the argument was not open to Cannon because they had not taken it before the adjudicator (or indeed before the judge) and their general reservation of position did not permit that argument to be run on enforcement. As it is, I have accepted the basic proposition that the adjudicator had the necessary jurisdiction.

116. The real issue in the *Cannon* appeal was whether the judge was entitled to enter summary judgment in favour of Primus. For the reasons set out in **Section 8.1** above, I consider that he was. Although each case will turn on its own facts, there are potentially important differences between a company in liquidation and a company in a CVA. Moreover, on the particular facts of this case, there were a number of good reasons to justify the entering of summary judgment to enforce the decision of the adjudicator.

117. For the reasons set out in **Section 8.2** above, having concluded that Primus were entitled to summary judgment, it was almost inevitable that the judge would refuse Cannon's application for a stay of execution. On the evidence, Cannon were plainly the principal cause of Primus' financial difficulties.

118. I had ordered Cannon to pay the £2.128 million into court as a condition of granting permission to appeal. When informing the court about the settlement, the parties in the *Cannon* appeal asked for an order by consent that that sum be paid out to Primus' solicitors. That order was made on 13 December 2018. No further order is therefore required in the *Cannon* appeal.

10. Conclusions

119. Accordingly, if my Lord and my Lady agree:

a) I would refuse Bresco's appeal. Given that they had been in liquidation for 3 years by the time of the reference and Lonsdale had a cross-claim, it was neither just nor convenient for the adjudication to continue. The adjudication was properly described as 'an exercise in futility'. The appeal against the order of Fraser J is therefore dismissed.

b) I would make no further order on Cannon's appeal.

Lady Justice King:

120. I agree.

Sir Andrew McFarlane, The President of the Family Division:

121. I also agree.