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Construction Act Review

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JURISDICTION: GENERAL RESERVATION OF RIGHTS

Introduction

In a previous edition of Construction Act Review in 2014, the writer reviewed the law on reservation of rights where a responding party in an adjudication makes or intends to make a jurisdictional objection.[1]

This article is concerned with one aspect of reservation of rights in respect of jurisdiction discussed in that earlier article, that is, a reservation in general terms or of general application, rather than one linked to a specific jurisdictional objection made to the adjudicator.

In the 2014 article, the writer addressed various other aspects of reservation of rights; what was said then generally still holds good. On the issue of a general reservation, the law may have changed.

In the 2014 article, the writer made the following observations on the case law available at that time.

In *Bothma v Mayhaven*,[2] a contractor sought in adjudication the resolution of four matters, one of which was purely a valuation issue; the others were time-related. The adjudication was subject to the Scheme, under paragraph 8(1) of which an adjudicator has no jurisdiction to determine more than one dispute, otherwise than with the consent of the parties. The employer (Mayhaven) had taken a number of specific points as to jurisdiction, but not the point that it ultimately took in court, which was that that the adjudicator had adjudicated on more than one dispute. Mayhaven had, however, also made a general reservation of its right to take any other point as to the adjudicator's jurisdiction. The Court of Appeal took the view, on an application for leave to appeal, that the general reservation entitled Mayhaven to take the "more than one dispute" point, without having to decide the point. Bothma had argued that Mayhaven had waived the right to take the point, but did not pursue the argument with the Court of Appeal. Waller LJ stated:

> "No point was expressly taken by the employer as to the adjudicator's jurisdiction to deal with more than one point, but unfortunately the employer made it clear that he reserved his position in relation to jurisdiction in very wide terms; so wide indeed that Mr Newman has very properly not pursued an argument that, in some way, the

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[1] Jurisdiction: Reservation of Rights

[2] *Bothma v Mayhaven Healthcare Ltd* [2007] EWCA Civ 527 (CA); 114 Con. L.R. 131.

> employer had consented to more than one point being argued or consented, or waived any question of jurisdiction on that basis."[3]

Ramsey J considered the *Bothma* case to provide "strong support for the effectiveness of a general reservation" in the *GPS Marine* case,[4] as did a consideration of the authorities in relation to arbitration.[5]

An example of a general reservation not being maintained is provided in the *Durham County Council* case,[6] in which the defendant made a number of specific reservations and one general one. Akenhead J considered on the facts that the defendant had later waived the general reservation, though this was not part of the ratio decidendi as the judge found that the adjudicator did have jurisdiction.

The writer concluded in the earlier article: "A general reservation (not specifying the ground on which jurisdiction is challenged) is probably effective to allow a responding party to raise whatever jurisdictional objection it chooses when it comes to enforcement."[7] That does not now still hold good. In this article the writer considers new guidance given by the Court of Appeal in the *Bresco* case, intended to create a change in the law, and two post-*Bresco* cases.

The *Bresco* case

The *Bresco* case went to the Supreme Court on the question whether a company in liquidation may adjudicate and whether an injunction should be granted to prevent such an adjudication.[8]

In the Court of Appeal, there were two cases: the *Bresco* case and the *Cannon* case.[9] The *Cannon* case did not go to the Supreme Court; in fact it settled shortly before the Court of Appeal gave judgment, but the judgment was given anyway because it gave useful guidance for future cases. The *Cannon* case is relevant on the issue of general reservations as to jurisdiction. Although the *Bresco* decision in the Court of Appeal was overturned by the Supreme Court, the *Cannon* decision in the Court of Appeal still stands.

Cannon was the party making the jurisdictional objection. The Court of Appeal decided that the jurisdictional objection failed. The jurisdictional objection was in principle the same as

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[3] At [14].
[4] *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* [2010] EWHC 283 (TCC); B.L.R. 377 at [39].
[5] *Compania Maritima Zorroza Sa v Sesostris SA, The Marques de Bolarque* [1984] 1 Lloyd's Rep. 652; *Allied Vision Ltd v VPS Film Entertainment Gmbh* [1991] 1 Lloyd's Rep. 392.
[6] *Durham County Council v Kendall* [2011] EWHC 780 (TCC) ; [2011] All ER (D) 351 (Mar); [2011] B.L.R. 425.
[7] See *Bothma*, above and *GPS Marine*, above.
[8] *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25.
[9] *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd & Cannon Corporate Ltd v Primus Build Ltd* [2019] EWCA Civ 27.

that in *Bresco*, considered in detail by the writer in a previous edition of this journal.[10] In short, the point decided was that an adjudicator has jurisdiction to decide a dispute referred by a party in liquidation. The issue whether Cannon's general reservation of its right to make its jurisdictional objection was effective was therefore, as Coulson LJ remarked, "redundant". He stated:

> "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 jurisdictional 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."[11]

It seems clear from Coulson LJ's recognition that the issue was redundant and his suggestion that it may "be useful" for his to set out what he considered the applicable principles, that this guidance was *obiter* and therefore not binding in future cases.

The policy consideration motivating Coulson LJ to give the guidance was his view that arguments about waiver and general reservations of position arise much more often in adjudication cases than they should. That is a somewhat questionable value judgment. The policy is also rather too vague to be useful, because the correct level of frequency with which these arguments should be made is not identified, although it is seemingly acknowledged by Coulson LJ that there is such a level. To the writer, it would seem as a matter of common sense that these arguments should be raised whenever they are applicable, whatever the frequency of that may be. The writer accordingly does not agree with the concept that there is any such thing as a correct level of frequency with which these arguments should be made.

Coulson LJ stated:

> "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*,[12] 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 these 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 arbitrator which he did not otherwise have. In *Allied Vision Limited v VPS Film Entertainment GmbH*,[13] Potter J followed the same approach, noting that 'subsequent participation in the arbitration under the

[10] Insolvency and Adjudication: Liquidation (2020) 36 Const.L.J. 503.
[11] *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd & Cannon Corporate Ltd v Primus Build Ltd* [2019] EWCA Civ 27 at [82].
[12] [1984] 1 Lloyd's Rep. 652.
[13] [1991] 1 Lloyd's Rep. 392.

> umbrella of the original reservation will not, without more, amount to a waiver or ad hoc submission'."[14]

Thus in arbitration a general reservation in respect of jurisdiction is effective and is not waived by subsequent participation in the arbitration. The "older decisions", from the 1980s and 1990s are not particularly old, but they pre-date the statutory adjudication regime for construction contracts. Nevertheless, in so far as guidance may be taken from arbitration law, it clearly points to a general reservation being effective, that is, it will allow a party reserving its position generally at the outset to make a jurisdictional objection later that it did not raise specifically at the outset. Having made that effective reservation, the party making it does not waive it by participating in the arbitration.

Coulson LJ proceeded to opine that the courts have been anxious to ensure that the purpose of the HGCR Act is not defeated by the 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.[15] In support of this proposition, Coulson LJ quoted various authorities, starting with Akenhead J's judgment in *Allied P & L*.[16] However, the passage quoted by Coulson LJ[17] from *Allied P & L* does not live up to Coulson LJ's billing. All that Akenhead J was saying, quite correctly, was that it is necessary for a party challenging jurisdiction on enforcement to have reserved its position effectively. There was no reservation at all in respect of the jurisdictional point raised in court, so *Allied P & L* is simply an illustration of the simple point that if a party raises jurisdictional points before an adjudicator and reserves its position only in respect of those specific points, it cannot successfully raise a novel jurisdictional point in court. Akenhead J was not addressing the question whether a general reservation is an effective reservation in that situation, because that point did not arise in *Allied P & L*.

Next, Coulson LJ relied on two decisions of Ramsey J, *GPS Marine Contractors*[18] and *Laker Vent Engineering*.[19] In *GPS Marine Contractors*, Ramsey J did remark that certain practical difficulties suggested that the use of general reservations is undesirable, but he went on to say that does not determine whether a general reservation is effective. As noted above, he took the view that the decision of the Court of Appeal in *Bothma* provided strong support for the effectiveness of a general reservation. He also took the view that the approach taken in the arbitration cases *Marques de Bolarque* and *Allied Vision* was equally applicable in the case of adjudication. In both *GPS Marine Contractors* and *Laker Vent Engineering* Ramsey J found a general reservation to be effective. So these cases do not support Coulson LJ's thesis.

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[14] *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd & Cannon Corporate Ltd v Primus Build Ltd* [2019] EWCA Civ 27 at [83].
[15] *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd & Cannon Corporate Ltd v Primus Build Ltd* [2019] EWCA Civ 27 at [84].
[16] *Allied P & L Limited v Paradigm Housing Group Limited* [2009] EWHC 2890 (TCC).
[17] *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd & Cannon Corporate Ltd v Primus Build Ltd* [2019] EWCA Civ 27 at [85].
[18] *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* [2010] EWHC 283 (TCC); [2010] All E.R. (D) 232; [2010] B.L.R. 377.
[19] *Laker Vent Engineering Ltd v Jacobs E&C Ltd* [2014] EWHC 1058 (TCC).

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The practical difficulty that Ramsey J identified will often not arise. He posited the situation where the responding party in an adjudication makes only a general reservation, so that the adjudicator and referring party are not able to consider any specific jurisdictional objection. However, a general reservation does not preclude the responding party from also raising specific jurisdictional objections, which may be considered at the time.

Coulson LJ does not consider or comment on the earlier view of the Court of Appeal in *Bothma* that a general reservation is effective.

Next, Coulson LJ quoted a summary of the position concerning reservation[20] by Akenhead J in *Aedifice Partnership*.[21] Again the passages quoted do not support Coulson LJ's thesis. Akenhead J does not specifically address the issue of the effectiveness of a general reservation. However, some of what he said could be prayed in aid of the effectiveness of a general reservation:

> "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…
>
> 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…"

Akenhead J did not in any way disagree with what Ramsey J had said in the earlier case, *GPS Marine Contractors*, in relation to general reservation, although Akenhead J did not refer to this earlier case.

Coulson LJ also quoted the following passage from a subsequent decision of Akenhead J, referring back to his own summary in *Aedifice*:

> "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…"[22]

As in none of the passages quoted from Akenhead J was he addressing general reservations, his references to the requirement for effective reservation beg the question whether a general reservation would be effective. They do not support the proposition that a general reservation is not effective, or not effective in some circumstances.

Finally, Coulson LJ referred to the *Equitix* decision,[23] in which it was stated:

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[20] *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd & Cannon Corporate Ltd v Primus Build Ltd* [2019] EWCA Civ 27 at [88].
[21] *Aedifice Partnership Ltd v Shah* [2010] EWHC 2106 (TCC); [2010] All E.R. (D) 65.
[22] *CN Associates v Holbeton Ltd* [2011] EWHC 43 (TCC); [2011] All E.R. (D) 217; [2011] B.L.R. 261.
[23] *Equitix ESI CHP (Wrexham) Limited v Bester Generacion UK Limited* [2018] EWHC 177 (TCC).

> "…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 unspecified 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."[24]

This last sentence does support Coulson LJ's thesis. However, two points should be noted here; firstly, Coulson J (as he then was) was the judge in the *Equitix* case and secondly, despite his formulation as to the court "usually" looking with disfavour on a general reservation in the circumstances described, he does not cite any authority, although there is copious citing of authority in this section of the judgment.

So it would be a fair summary to state that the authorities prior to the *Bresco/Cannon* cases indicated that a suitably worded general reservation would normally be effective to permit a jurisdictional objection, not raised with the adjudicator, to be raised on enforcement, but that Coulson LJ wished to change the law by his judgment in the *Cannon* case so as to make a general reservation more likely to be ineffective in those circumstances.

It is appropriate to pause at this point to consider the policy considerations that may have led Coulson LJ to want to introduce this change of the law. The starting point for any such consideration is that the adjudicator's decision has been made without jurisdiction and is invalid (unless rescued by waiver of the right to make the jurisdictional objection). That, *ex hypothesi*, will be the position, otherwise Coulson LJ's thesis is of no significance. In the writer's view, it would seem prima facie desirable that invalid decisions should not be enforced, not that they should be enforced. While the courts' enthusiasm for enforcing valid decisions is understandable, the enthusiasm for enforcing invalid decisions is less so.

True it is that the other party may have wasted time and money, in conducting and adjudication, some of which might have been saved if the jurisdictional objection raised in court had been raised with the adjudicator. However, that is by no means certain, because it is not unusual for a jurisdictional point that succeeds in court to have first failed with the adjudicator. In addition, it is a risk the other party takes if it pursues a case in respect of which the adjudicator does not have jurisdiction.

There are other considerations that in the writer's view point in the opposite direction from Coulson LJ's proposed change in the law. One is that a general reservation is valid in arbitration, although arbitration is almost invariably much slower and more expensive than adjudication, so that the lost time and money is all the greater in arbitration. In addition, in arbitration it is easier to raise specific jurisdictional objections because there is more time. It is less easy in adjudication because the responding party is often in a rush to deal with all the substantive issues and it may not be practicable to raise every available jurisdictional point at the outset.

[24] *Equitix*, above, at [38].

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Another important consideration is that adjudication is supposed to be a quick, inexpensive and informal process. There is no need for a responding party (or any party) to instruct lawyers; parties may conduct adjudications themselves. It is expecting a lot from lay parties that they must be astute at the very outset of an adjudication, of which they may have had no notice or expectation, not only to raise every available jurisdictional objection but to reserve their position to re-argue the point in court in the event of enforcement. These are quite sophisticated legal matters.

There is something of a double standard here; responding parties are required on Coulson LJ's approach to be highly astute as to highly technical points at the outset of an adjudication, although this may set the bar unrealistically high. At the enforcement stage, when it is more or less necessary, unlike in adjudication, to have legal representation, they are to be met with a highly technical new principle of constructive waiver. In addition, parties making a jurisdictional objection in court, having previously made a general reservation, are then to be criticised for taking "technical" points.

A further consideration is that a change in the law is prima facie undesirable, because parties have to change their approach; some will be caught out because they are in the process of adjudicating or defending enforcement proceedings. So there needs to be good reason for a change in the law, particularly when made by the courts.

With those arguments in favour of general waivers being effective in mind, it may be wondered what rationale Coulson LJ gave for his approach and what policy considerations were giving him cause for concern. The answer is to found in the following passage.

> "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 Marques 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."[25]

One can quite readily test the proposition that the purpose of the HGCR Act would be substantially defeated if a general reservation were effective to reserve the right to make a jurisdictional objection before the court on enforcement that had not been taken before the adjudicator. Since it has always been understood that such was the position for the 20 years or so prior to Coulson LJ's judgment in the *Bresco/Cannon* case, that is, for effectively the

[25] *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd & Cannon Corporate Ltd v Primus Build Ltd* [2019] EWCA Civ 27 at [91].

entire history of statutory adjudication, a "control group" is available. In fact, the history of adjudication to 2019 is the only relevant material. It is not, however, the case that the purpose of the HGCR Act has been substantially defeated in that period by the making of general reservations as to jurisdiction. Certainly the Supreme Court did not think so in the *Bresco* case in 2020. Lord Briggs described adjudication under the HGCR Act in glowing terms as a success story over that period. Coulson LJ's prognostication of future failure of the regime if general reservations were to have continued to be effective was therefore in the writer's view unduly gloomy.

Although Coulson LJ describes the making of a jurisdictional objection before the court on enforcement that had not been taken before the adjudicator in rather derogatory terms in the passage quoted above, one matter he does not address is any point of distinction between doing so and the making of a jurisdictional objection in arbitration after making a valid general reservation, despite his conclusion disagreeing with Ramsey J and his apparent acceptance that the same process is valid in arbitration. What he describes is, in essence, the same as what would occur in arbitration. Of course, the comb-through would only be significant in either case if it resulted in a good jurisdictional point that established the tribunal did not have jurisdiction.

It is usually a matter for concern when the judiciary sees unexplained differences between arbitration and adjudication; in the earlier days of adjudication there was for a time a view that "dispute" means something different in adjudication, although there was no good reason for this view, which thankfully was eventually abandoned.

Notwithstanding the writer's misgivings, Coulson LJ's dictum under discussion was quoted with approval by Lord Woolman in the recent Scottish case *Hochtief Solutions AG v Maspero Elevatori S.p.A.*[26] The court was rejecting an argument that Scots law does not require a formal challenge and an adjudicator either has jurisdiction or he has not. The reasons given for rejecting that argument were said to be the reasons given by Coulson LJ in the dictum just quoted; no further analysis was given by Lord Woolman. It is a little odd, as Coulson J was addressing a different issue, that is a general reservation, whereas the argument the Inner House was rejecting was that in Scots law no challenge before the adjudicator at all was required before raising a jurisdictional objection in court. While the writer has no quarrel with the rejection of that argument, the analysis is doubtful. Lord Woolman did not consider any of the points the writer has raised by way of criticism of Coulson LJ's dictum. The Inner House's brief analysis of its rejection of the argument before it was, in the writer's view, obiter, as on the facts of the *Hochtief* case, Maspero had in fact raised the specific jurisdictional objection it made in court before the adjudicator. The objection failed before the adjudicator and in court. The correct analysis, it is submitted, for the Inner House's rejection of the argument before it, is that if there has been no formal challenge before the adjudicator, then the party seeking to make the jurisdictional objection in court would have waived the right to do so, provided it could have made the jurisdictional objection to the adjudicator but failed to do so.

[26] [2021] CSIH 19/CA77/20.

Waiver

Whether a party who has made a general reservation later waives it is a question of fact. It will accordingly depend on all the relevant facts of the particular case, including the wording of the reservation and the conduct of the party seeking to rely on the reservation. Subsequent participation in the adjudication will not necessarily be conclusive. Coulson LJ acknowledged that a general reservation may be effective. However, his summary of the applicable principles on waiver and general reservations in the adjudication context, informed, as he stated, by the passage just quoted, was 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, Aedifice*). Much will turn on the wording of the reservation in each case. However, a general reservation may not be effective if:
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> 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*)."

Some of these points are overstated, in the sense that the authorities quoted do not support the proposition as explained above.

The *Ove Arup* case

Soon after the *Bresco* case, O'Farrell J quoted the passage just quoted from the *Bresco* case, stating these guidelines provide a useful test which she would apply in the case before her, taking the approach no doubt intended by Coulson LJ.[27]

In this case, the responding party, CBI, made the jurisdictional objection that Part 2 of the HGCR Act did not apply to the matters referred to adjudication. As CBI gave no basis for this assertion in the adjudication, O'Farrell J found that it fell foul of the requirements laid down by Coulson LJ in the *Bresco* case for any challenge to be appropriate and clear. There was a general reservation, but this was not sufficient to enable the adjudicator to understand and deal with the nature of the objection, one of the mischiefs with which Coulson LJ was concerned. CBI also raised two specific jurisdictional objections, which failed before the adjudicator. In addition on the facts of this case, CBI had positively admitted there was jurisdiction by reference to the application of section 104 of the HGCR Act.

CBI's general reservation was in the following terms: "Whilst CBI will participate in the adjudication, it will do so under protest and without prejudice to its contention that any adjudicator or adjudicators that are appointed lack jurisdiction. CBI therefore disputes jurisdiction on the grounds summarised above and on further jurisdictional issues that we have not yet had the opportunity to investigate in the limited time we have had since the service of the notice."

O'Farrell J found the general reservation to be in such vague terms as to fall foul of Coulson LJ's tests, in that the objector knew or should have known of specific grounds and in that the general reservation was worded in that way simply to try and ensure that all options could be kept open.

Kingstone Civil Engineering

Judge Halliwell also quoted paragraphs 91 and 92 from Coulson LJ's judgment in *Bresco* in the recent *Kingstone* case[28] and made the following comments in relation to it:

> "On this basis, a party will generally be taken to have waived any jurisdictional objection and thus lose its right of election if it participates in the adjudication without reserving its position in clear and appropriate terms. To do so effectively, it will generally be expected to reserve its rights in terms tailored, no doubt, to the jurisdictional challenge. In the absence of good reason, a general reservation will be ineffective if the nature of the jurisdictional challenge is not identified."[29]

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[27] *Ove Arup & Partners International Ltd v Coleman Bennett International Consultancy plc* [2019] EWHC 413 (TCC).
[28] *Lane End Developments Construction Ltd v Kingstone Civil Engineering Ltd* [2020] EWHC 2338 (TCC).
[29] *Lane End Developments Construction Ltd v Kingstone Civil Engineering Ltd*, above, at [57].

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Whether Judge Halliwell proceeded from this basis to apply Coulson LJ's new guidance in the manner intended by Coulson LJ is a moot point.

Lane End succeeded in resisting Kingstone's application to enforce an adjudicator's decision made at the end of an adjudication which was subject to the statutory Scheme for Construction Contracts. Lane End's successful point was that the adjudicator did not have jurisdiction, because Kingstone had applied to a nominating body for the appointment of an adjudicator, before serving notice of adjudication. The Scheme, at paragraph 2(1), requires a request for the appointment to follow the giving of a notice of adjudication.[30]

However, Lane End had not taken that point in the adjudication. It had argued to the adjudicator that the notice of adjudication did not do enough to disclose an intention to refer the dispute to adjudication, an argument that the judge noted Lane End wisely did not pursue in court. At the same time as raising this at an early stage, Lane End reserved its position on jurisdiction, stating that "…any decision would be unenforceable due to the procedural irregularities which undermine the Adjudicator's threshold jurisdiction". Lane End subsequently repeated on several occasions that it reserved its position on jurisdiction in general terms, such as "we reserve our client's position as to your jurisdiction".

Judge Halliwell stated that "When considered objectively and as a whole, these reservations can be seen to have been made to preserve a specific jurisdictional challenge on the basis that [the adjudicator] had not been appointed under a valid statutory notice of adjudication."[31]

There are two possible ways in which Judge Halliwell may have considered this conclusion to be justified. It may be that if a specific objection is made to the adjudicator as to the validity of the notice of adjudication and there is also a general reservation, the responding party is taken to have effectively reserved the right to make a different objection before the court, if the different objection is one that also goes to the question whether the notice of adjudication is valid. That appears prima facie to be what he is saying in the passage quoted and is in the writer's view the ratio decidendi of the decision.

While the writer does not disagree with the result in this case, it is doubtful if Coulson LJ would agree, at least with the analysis as just stated. If it were possible to make a specific objection of a particular category (in this case, as to the validity of the notice of adjudication) to the adjudicator, with a general reservation which was apt to cover any other objection of the same category, and then later succeed in court with a different objection but of the same category, the initial objection having turned out to be a bad point, Coulson LJ would be likely to regard that as unsatisfactory. The adjudicator and the other party would not have been notified of and had the opportunity to consider the ultimately successful point.

A second way in which Judge Halliwell may have considered his conclusion to be justified is that Lane End repeatedly reserved its position as to jurisdiction, as carefully recorded in the judgment. It may be that the judge considered this case to be an example of a valid general reservation, a possibility acknowledged by Coulson LJ. It may have been the judge's view

[30] See also *Vision Homes Ltd v Lancsville Construction Ltd* [2009] B.L.R. 525.
[31] *Lane End Developments Construction Ltd v Kingstone Civil Engineering Ltd*, above, at [62.2]; see also [63].

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on the facts that Lane End simply did not waive its general reservation but on the contrary continued to maintain it. However, Coulson LJ appears to have intended to discourage the notion that a general reservation preserves the right to make an objection not made to the adjudicator.

Conclusions

In the Technology and Construction Court and in the Court of Appeal, it is likely that the guidance given by Coulson LJ in the *Cannon* case will generally be followed. The following is accordingly the likely applicable position.

(1) 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.

(2) 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.

(3) 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.

(4) A general reservation of position on jurisdiction is undesirable but may be effective. Much will turn on the wording of the reservation in each case. However, a general reservation may not be effective if:

    (a) 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;

    (b) 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.

As is no doubt already apparent, the writer does not regard Coulson LJ's analysis of the position concerning general reservations in the *Cannon* case nor the analysis in the cases that followed, accepting this analysis, as satisfactory. It is therefore to be hoped that it will not be followed, as it is merely *obiter* guidance and that if the issue ever reaches the Supreme Court, a different approach will be taken. The analysis is unsatisfactory in the following respects.

(1) A general reservation is effective in arbitration cases, and there is no good reason why the same approach should not be taken in respect of adjudication.

(2) The same approach would be preferable *a fortiori* in adjudication cases, because of the speed at which adjudications have to be conducted.

(3) A jurisdictional objection should not be stigmatised as a "technical point". It is well established that an adjudicator's decision made without jurisdiction is normally invalid. Jurisdictional objections are good or bad, successful or unsuccessful; there is or should be no further category that is objectionable because it is "technical".

(4) The general reservation approach is in any case no more "technical" than the constructive waiver posited by Coulson LJ.

(5) The constructive waiver approach posited by Coulson LJ is not supported by any previous authority, other than a dictum of the same judge in the *Equitix* case, which was itself contrary to the previous authorities.

(6) It is not consistent with the view taken earlier by the Court of Appeal in the *Bothma* case.

(7) The statement in the *Equitix* case that the courts will look with disfavour on an unspecified general reservation that looks as though it was intended to keep open all options (including ones not thought of yet) suggests that looking on a reservation with disfavour is the same as the reservation being invalid. The approach assumes that keeping options open is undesirable. The writer does not accept either that it is distasteful to make a general reservation nor that it is undesirable for a party to keep its options open. It is normally desirable for that party, undesirable for the other party. It is not a matter on which the court should lean one way or the other. It is all perfectly permissible in arbitration cases; what is the difference here?

(8) The suggestion that the purpose of the HGCR Act would be substantially defeated if a party could reserve its position in respect of an unspecified jurisdictional objection, by a general reservation, is overstated and unconvincing.

(9) Implicit in that suggestion is the assumption that the purposes of the HGCR Act include the enforcement of adjudicators' decisions that are made without jurisdiction. It is a bold assumption, given that the HGCR Act addresses neither jurisdiction nor enforcement and that the courts do not normally enforce decisions made without jurisdiction.

(10) The notion that a general reservation drafted to cover objections not made to the adjudicator or perhaps not yet even thought of is too vague to be effective confuses and conflates two separate concepts. A general reservation of the type just described is broad and encompasses possible future objections. The fact that it is broad does not mean that it is vague, or uncertain. It can be, and, in the examples discussed in the cases, is broad, but also clear and certain. That is why it has worked in the arbitration cases; no doubt in the arbitration cases if the general reservations had been too vague to be effective, they would not have been effective.