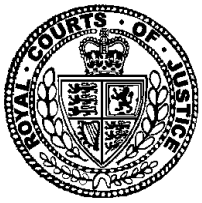

Neutral Citation Number: [2018] EWHC 3504 (TCC)

Claim No: HT - 2018-000298

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Date: 19 December 2018

B e f o r e :

MR JUSTICE WAKSMAN

SKYMIST HOLDINGS LIMITED

Claimant

- and -

GRANDLANE DEVELOPMENTS LIMITED

Defendant

Rupert Choat (instructed by Stephenson Harwood LLP, Solicitors) for the Claimant
Jonathan Selby QC (instructed by Goodman Derrick LLP, Solicitors) for the Defendant

APPROVED JUDGMENT

Hearing date: 10 December 2018

INTRODUCTION

1. This is a Part 8 challenge to a decision of the adjudicator dated 12 November 2018 although the claim in this court was issued before that decision was given, on 27 September 2018. By an order made on 19 October 2018, Fraser J refused to permit the Part 8 claim to be heard ahead of the decision. The challenge alleges that the adjudicator had no jurisdiction to make his (or any) decision on the dispute between the parties.

2. The Claimant, Skymist Holdings Limited ("Skymist") is the client for whom the Defendant, Grandlane Developments Limited ("Grandlane") was to provide development and project management services at a property known as Beaurpraire Country Estate, Bramely, Tadley, Hampshire ("the Property"). The Property is owned by Skymist, a BVI company owned and/or controlled by Mrs Elena Baturina. The adjudicator, Mr John L Riches is a quantity surveyor who works at Henry Cooper Consultants Ltd.

3. It is common ground that on any view the contract between the parties was a "construction contract" for the purposes of Part 1 of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme").

4. This case involves the application of paragraph 2 (1) of the Scheme which provides as follows:

> "Following the giving of a notice of adjudication and subject to any agreement between the parties to the dispute as to who shall act as adjudicator-…
>
> (b) if no person is named in the contract… and the contract provides for a specified nominating body to select the person, the referring party shall request the nominating body named in the contract to select a person to act as adjudicator or
>
> (c) where neither paragraph (a) nor (b) above applies,… he referring party shall request an adjudicator nominating body to select the person to act as adjudicator."

5. By a letter dated 27 October 2017, Skymist terminated Grandlane's services. Grandlane claimed that it was owed substantial sums as at the date of termination. It formally claimed those sums first by its (then) solicitors' letter dated 27 November 2017 and later, by its present solicitors' letter dated 19 July 2018. As Skymist disputed the claim, Grandlane sent a Notice of Adjudication to it on 10 August 2018 and by a letter to the Chartered Institute of Arbitrators ("CIArb") dated 13 August 2018, it requested that body to nominate an adjudicator. It did so pursuant to paragraph 2 (1) (b) of the Scheme, because it said that the contract between Skymist and Grandlane contained, at Clause 14.2 (b) ("the Clause"), a term which provided for a nominating body, namely CIArb. Grandlane's request form specified that there was an agreement dated December 2016 which contained a conforming provision about adjudication. This term is to be found in a document to which I shall refer hereafter as the Draft Deed of Appointment ("the DOA"). The request led to the nomination by CIArb of a Mr Silver, a lawyer, as the adjudicator. While Skymist accepted that the relevant contract was subject overall to the Scheme and therefore an adjudicator had to be appointed, it denied that the contract in question was the DOA or at least a version of it which contained the Clause.

6. By a set of submissions dated 24 August 2018, headed "Skymist's Jurisdictional Objections", Skymist contested the jurisdiction of Mr Silver on 5 grounds. One of those grounds was that, according to Skymist, the contract between the parties was not contained in the DOA and did not on any view contain the Clause; accordingly, any appointment of Mr Silver through CIArb as the apparent nominating body would be a "nullity".

7. In the light of those objections, Grandlane withdrew the adjudication by a letter dated 29 August 2018. On 31 August 2018 it issued a new Notice of Adjudication containing much of that which was in the original Notice but with some important omissions and additions. It wrote to the RICS Dispute Resolution Service on 3 September 2018, requesting that body to nominate an adjudicator and this resulted in the appointment of Mr Riches. It took that course because, in the absence of a contractual term providing for a particular nominating body, Grandlane had to request an adjudicator nominating body (like the RICS) to select the adjudicator. Accordingly, in the request form here, Grandlane stated that the application for the adjudicator was made under the Scheme not by way of a contractual provision i.e. pursuant to paragraph 2 (1) (c).

8. By a letter dated 3 September 2018 from its solicitors, Stephenson Harwood ("SH"), Skymist wrote to the RICS, suggesting that the latter nominate Mr Silver for this new adjudication. Failing that, Skymist contended that it should at least be another senior construction lawyer. It did not at that stage take issue with the principle that the RICS should nominate the adjudicator.

9. On 10 September 2018, SH wrote to Grandlane's solicitors Goodman Derrick ("GD"), copied to Mr Riches, seeking clarification as to Grandlane's case on the DOA having seen the references to it in its Referral dated 7 September 2018. On 11 September 2018, GD wrote to say that it did not consider that any clarification was appropriate. Skymist in turn took issue with that in SH's letter dated 11 September, after which Mr Riches called a halt (see his email of the same day) and said that Skymist should now serve its Response which could deal with any points on jurisdiction (among others). That Response was served on 17 September 2018. Section E thereof dealt with jurisdiction, the remainder of this substantial document dealing with the merits. The thrust of Section E was that since Grandlane's case was (or still was) that the relevant contract was constituted by the DOA, the reference to the RICS to nominate an adjudicator was wrong because the Clause provided for an adjudicator to be appointed by a particular body (i.e. CIArb) and yet this had not been done. It will be appreciated immediately that this latter course of appointment was precisely what Skymist had objected to in respect of the first adjudication.

10. By a letter dated 19 September 2018, Mr Riches wrote to say that he considered that he had jurisdiction and would proceed with the adjudication.

11. Grandlane's Reply was served on 24 September 2018. Skymist's Part 8 claim followed, as noted above, on 27 September with Mr Riches' decision ("the Decision") being issued on 12 November.

THE ISSUES

12. Skymist's overarching submission is this: if Mr Riches was nominated by the wrong body, then he had no jurisdiction even if he (or some other adjudicator) could have been appointed - or would have to have been appointed - by some other body. Assuming for the moment that this proposition is correct, Skymist then argues that Mr Riches was indeed appointed by the wrong nominating body because:

    (1) By the Decision, he found that the relevant contract between the parties was the DOA or at least a contract which included the Clause, itself part of the DOA; but if so, the

appointment should have been made by the CIArb as the mandated nominating body and not the RICS; further or alternatively:

(2) Even if the Decision did not so hold, Grandlane has "approbated and reprobated" the DOA or "blown hot and cold" about it, in that on the one hand, Grandlane relied upon it, or material parts of it, for the purpose of its substantive submissions to Mr Riches, and yet reprobated at least part of it (i.e. the Clause) when seeking a nomination from the RICS; but if so, then the principle which prevents approbation and reprobation ("A/R") means that Grandlane cannot reprobate the DOA as it has done. The result is that it was and is precluded from applying to the RICS to nominate Mr Riches.

13. On either basis, Skymist contends that the result is that the Decision is a nullity for want of jurisdiction.

14. This challenge is resisted in its entirety by Grandlane.

15. Before analysing the two aspects of the present claim, I should set out the salient facts and my observations thereon, in particular as to what, objectively, Grandlane was or was not contending for in respect of the DOA and what, objectively, the adjudicator did or did not decide.

THE FACTS

Background

16. Both sides accept that there was a contract between them. Both sides also accept that the original contract was between Grandlane and Mrs Baturina personally, until it was transferred or novated, by consent, to Skymist. That happened in about May 2016.

17. Both sides also agree that a document called "Development Management Agreement-Beaurepaire General Terms and Conditions ("the TC") evidenced the key terms of the contract both in terms of the services to be provided and remuneration.

18. The TC provided, among other things, for the following:

> "**Engaging of contractors and consultants** ..When necessary and approved by the Customer, GL shall engage professionals (engineers, designers, architects, etc) and shall agree the budget to pay for the services. At the discretion of the Customer the payment for services performed shall be made directly by the Customer or by the GL at the expense of Customer on a monthly basis.…
>
> **Remuneration** According to the payment schedule to these General Terms and Conditions. In the event the Customer decides to increase or decrease the budget the remuneration will be adjusted based on a new budget. The remuneration shall be calculated as follows: 5% of the total construction costs for the project management services and 0.5% of the total construction costs for the procurement of permits services.…
>
> **Termination and expiration of the Agreement** In accordance with the standard market practice for this type of agreements".

The DOA

19. This is a 50-page document, heavily revised and redrafted in parts which was circulated between the parties' solicitors, with a final iteration dated 9 December 2016. It was never signed and there is no evidence that both parties agreed all of its contents in some other way, for example by email agreements to the final draft.

20. For the purpose of the present dispute, I would refer to the following terms:

    (1) Clause 7.10 which provides for a contractual rate of interest of 3% above base in relation to any sum due to Grandlane but unpaid;

    (2) Clause 12.1 which permitted Skymist to terminate performance of the Services by Grandlane upon the giving of one month's notice in writing; this has been referred to as "termination at will";

    (3) Clause 12.3 which provides as follows:

> "Upon termination of the Services under clause 12.1, the Client shall pay [Grandlane] the appropriate part of the Fee for that part of the Services properly completed at the date of termination together with [its] reasonable and proper cost of bringing performance of the Services to an end on the condition those costs have been approved by the Client in writing in advance. [Grandlane] shall have no other claim arising out of the termination including loss of profit, loss of reputation, loss of use of staff and or equipment or redundancy costs."

    (4) Clause 13 which provides for summary termination by Skymist in the event of material breach of its obligations on the part of Grandlane, certain other termination events and consequential provisions; and

    (5) Clause 14 which provides for adjudication in accordance with the Scheme and then subparagraph (b) ("the Clause") provides that:

> "the nominating body for purposes of the Scheme shall be the President or Vice President (or other official nominated by them for these proceedings) of the Chartered Institute of Arbitrators."

The Termination Letter

21. This alleged that the contract between the parties included the TC and the payment schedule referred to therein. Skymist alleged that it was entitled to terminate the contract by reason of Grandlane's repudiatory breach of contract, alternatively it was terminating at will, and was entitled to do so because, for the purposes of the TC, market practice for a professional appointment would allow for termination by the client "at convenience".

22. While Grandlane did not accept that Skymist was entitled to terminate the contract as it did, and that it was Skymist which was now itself in repudiatory breach, it did not claim damages against Skymist as a result thereof.

The Underlying Claim

23. Grandlane's claim is for the following sums which it says had fallen due as at the date of termination:

(1) £620,000 being 5% of the total construction costs (of £12.4m) less the sums already paid on account by Skymist. This element of the claim is agreed (Claim 1);

(2) 0.5% for the procuring of permits services; Grandlane had contended that this too was to be taken as a percentage of the intended total value of the Property (said to be some £40m). Skymist agrees that it was 0.5% but of the total construction costs which would mean that the sum due was £62,000; this is what the adjudicator found. (Claim 2);

(3) Thirdly, payment in respect of monies either paid or payable to third parties engaged by Grandlane as part of its services for the purpose of the development of the project; leaving aside individual points on particular third parties, Skymist's overarching point was that Grandlane was not entitled to payment in respect of the fees of any third party which Grandlane had not yet paid itself; the adjudicator found that Grandlane was entitled to payment from Skymist irrespective of whether it had yet paid the relevant contractor.(Claim 3).

The Notice of Adjudication

24. This was a revised version of that which had been used for the purpose of the first adjudication. Deletions from the original were shown in red and additions, in blue. I refer to the following parts of it below, using underlining to indicate added parts and (if necessary) strike-out fonts to indicate deletions:

(1) Paragraph 3.1 which stated (as had the original) that the contract was "partially evidenced in writing";

(2) Paragraph 3.2 which referred to the transfer of the contract to Skymist and that

> "the terms of a formal development management agreement was negotiated and agreed in or around December 2016. Skymist at that time retained the services of Taylor Wessing who drafted the development management agreement on behalf of Skymist and who negotiated the terms. Grandlane acted as development manager for Skymist and Grandlane invoiced Skymist directly from 24 May 2016 (the "Contract").

(3) Paragraph 3.3 said that the Contract "included the carrying out of construction operations and ~~expressly included~~ therefore was a construction contract within the meaning of section 104 of the Construction Act, ~~the Scheme and the right for the parties to adjudicate at any time.~~

(4) Paragraph 3.4 was unchanged and referred to Grandlane's right to be indemnified against all consultants' fees paid, a fee of 5% of the construction costs for the development management services and a fee of 0.5% of the out-turn cost of the property for planning consent services;

(5) Paragraph 4.4 made clear that there was no claim made by Grandlane for Skymist's repudiatory breach of the contract;

(6) Paragraph 6.1 provided that "~~Clause 14.2 (b) of the Contract specifies that the nominating body for the purpose of the scheme shall be… The Chartered Inst of Arbitrators…~~ Grandlane will apply to the .. Royal Institute of Chartered ~~Arbitrators~~ Surveyors (RICS)… for the appointment of an adjudicator in this dispute";

(7) Paragraph 7.1.3 was in substance unchanged and sought the same sum of just over £1.4m in respect of third party consultant fees;

(8) Paragraph 7.1.4 claimed interest, not now pursuant to the terms of the Contract as originally alleged but at a rate of 8.5% under the Late Payment of Commercial Debts (Interest) Act 1998 ("the Act").

25. I agree that the terms of this NOA are not entirely clear as to which contract was being relied upon by Grandlane. Indeed, even in the original version, the contract in paragraph 3.1 was only "partially evidenced in writing". This does not sit easily with the suggestion in paragraph 3.2 that a formal development management agreement had been made in December 2016, certainly, if by the latter it meant a contract was contained in the DOA. The addition of the words "terms of" in the NOA however suggests that the latter point was not being advanced. Moreover, the express removal of the Clause and the reference to CIArb and the addition of the reference to RICS can only mean that no contract which included a provision as to an adjudicator nominating body ("ANB") was being relied upon. Equally the change of the interest claim means that the contractual interest provision in the DOA was not being invoked either. I do not accept that the reason for the change in the interest claim was because, between the two adjudications Grandlane thought it would recover more interest under the Act, as suggested by Skymist. It was clearly avoiding making a claim by reference to the DOA.

26. Accordingly, it cannot be said, in my view, that in the NOA, Grandlane was, objectively, relying on the DOA as a self-contained contract or one which included terms dealing with interest or an ANB.

27. Indeed, that appears to have been the view taken by Grandlane's own lawyers. Their letter of 3 September 2018 engaged with the RICS process (i.e. where the was no contractual ANB) because it simply argued as to who the right adjudicator would be for appointment by the RICS. Moreover, paragraph 6.4 of that letter states that the matters in dispute gave rise to complex contractual issues including in relation to the formation of the alleged contract between the parties and its terms "as shown by Grandlane now accepting that there is no contract specifying CIArb as the adjudicator nominating body". That view, of course, is not definitive from an objective view but it certainly suggests that the objective view which I have stated above is hardly implausible.

The Referral Notice ("the Referral")

28. Again, this is a revised version of the original referral, now similarly marked up in blue and red. The following passages are material:

(1) A new paragraph 3.10 which first repeated part of the original 3.9 to the effect that it was acknowledged that under clause 12 of the DOA, Skymist had the right to terminate at will. But it then added that "… Skymist asserts that the Draft Deed of Appointment was not agreed between the parties. It follows that Skymist is unable to rely on this clause"; and again it states that nothing turns on the point anyway since Grandlane was not here seeking damages for repudiation;

(2) Paragraph 3.11 then makes the claims for the three sets of fees referred to above;

(3) Under the heading "the Contract", paragraph 4 referred to the original agreement from 2014 and payment thereunder, the payment of the 5% management fee in late 2015,

the transfer to Skymist in about May 2016 and from that time the invoicing of Skymist directly and the payment of Grandlane's fees and expenses including the fees of third-party consultants, in accordance with an agreed monthly budget. The budgets contained Grandlane's fees and all of the third party consultants' fees every month. Paragraph 4.6 then stated expressly that "the above events evidence the contract between Skymist and Grandlane". Paragraph 4.7 then refers to the instructions to Skymist's lawyers to formalise the contractual relationship which was done in the Draft Deed of Appointment and the last amendments to it were made by Skymist and sent to Grandlane on 9 December 2016. All of this was new.

(4) Paragraph 4.8 then said that:

> " The main terms of the Draft Deed of Appointment were agreed. The main matter left in dispute was whether the Draft Deed of Appointment should be backdated to cover the time Mrs Baturena acted as Grandlane's employer. The matter does not concern the dispute referred to in this adjudication. ~~The Deed of Appointment was therefore agreed on or around 9 December 2016. This was a novation of the original agreement from Mrs Baturena to Skymist as Employer. Grandlane consented to this novation and Skymist became liable to Grandlane for payments. The novation was formalised by the negotiation of the Deed of Appointment.~~ Nonetheless, by Skymist's own submission, the Draft Deed of Appointment was never agreed in a final form and therefore was not agreed."

(5) Paragraph 4.9 begins as follows: "For the sake of clarity, the key terms of the Draft Deed of Appointment relevant to this dispute which were negotiated are as follows" and then clauses 1 (Definitions) 12 (Termination and Suspension at Will), 13 (Termination for Breach) and 14 (Disputes) were quoted.

29. While the language is not as clear as it might have been and while one might question why all the terms quoted in paragraph 4.9 were so quoted, in the light of the previous parts of the Referral in particular paragraph 4.8, I do not think that, objectively, paragraph 4.9 can be read as contending that the contract now relied upon by Grandlane was one which contained all of those terms. Mr Selby QC for Grandlane thought that it might have been pressure of time which caused Grandlane's lawyers simply to add some qualifying words in the opening part of paragraph 4.9 as opposed to more radical alteration and deletion. I agree with Mr Choat that even if true, that would be no more than a subjective reason as to why it was done in this way and that even if true it does not go very far in terms of considering objectively the terms of the Referral. However this point does not matter because, for the reasons already given, I think that in truth, paragraph 4.9 was not asserting all of the terms quoted and certainly not the Clause. The latter, of course, if effective, would contradict the request for the second adjudication just made by Grandlane in the light of Skymist's objections to CIArb.

30. Paragraph 4.10 then sets out the terms of the fees claimed. It is essentially unchanged, although the Deed of Appointment is now referred to throughout as "Draft". In that regard the fact that Grandlane had appointed consultants was expressly acknowledged in Appendix 2 to the DOA.

31. Paragraph 4.13 then quotes clause 7 of the DOA as being the method of payment "set out in the Contract". But in paragraph 4.15 it was stated that the "~~agreed~~ draft wording in clause 7"showed that Skymist agreed to indemnify Grandlane etc.

32. Paragraph 4.19 then quotes clause 12.3 of the DOA with this introduction: "While Grandlane does not wish to guess at the defence that will be put forward by Skymist, Grandlane ~~would note~~ notes that the terms for payment in the case of a termination under clause 12 of the Draft Deed of Appointment are as follows:.."

33. The references to clauses 7 and 12 in paragraphs 4.15 and 4.19 are thus qualified.

34. Paragraph 4.20 says that the 5% management fee had been negotiated in late 2015.

35. Paragraph 6.18 states that "If Skymist was relying on clause 12 of the Draft Deed of Appointment Skymist would need to (a) admit that the main terms of the Draft Deed of Appointment were agreed and (b) have complied with clause 12 of the Draft Deed of Appointment."

36. Paragraph 6.19 alleged that if Skymist admits or it is found by the adjudicator that the main terms of the Draft Deed of Appointment were agreed then Skymist had failed to notify Grandlane of the termination. Part of the original referral was then repeated to the effect that Skymist had failed to pay Grandlane in accordance with clause 2.3. Paragraph 6.20 contended that if there was a termination at will, this would require an acknowledgement that the main terms of the Draft Deed of Appointment were agreed. Here Grandlane was making the somewhat forensic and pre-emptive point that if Skymist wished to rely on clause 12 it would have to have agreed the main terms of the DOA as being operative – which it did not.

37. Finally, as with the NOA, interest was now claimed not pursuant to the contract but pursuant to the Act.

38. As noted above, in the letter of 10 September 2018, Skymist sought clarification of Grandlane's case on the relevant contract, without prejudice to its position on jurisdiction. Grandlane's response of 11 September did say that the Referral contained the same clauses as before and essentially the same arguments as before, save to take account of Skymist's arguments on jurisdiction. But the latter meant that Grandlane was not contending that the contract was contained in or evidenced by all of the clauses to be found in the DOA. I accept that, as noted above, there are elements of the Referral which are unclear, but I do not think that read fairly, and as a whole, it can be said that Grandlane was positively asserting a version of the contract that was contained in the DOA or one which had all or even most of the terms in the DOA and certainly not the Clause. One of the reasons why not adopting that position was plausible was because, once the arguments between the parties are stripped down to those necessary for the adjudicator to decide the claim, the actual contractual terms which both sides needed to rely upon were both few in number and essentially the same, regardless of the contractual analysis adopted. In other words, in truth, it was not necessary, in order for Grandlane to advance its case, to adopt the DOA in its entirety or place reliance on most of its terms.

The adjudicator's decision on jurisdiction

39. This is not itself the subject of challenge. It is to be noted however that he took the view that Grandlane was relying on the DOA while Skymist was not but then said there was common ground; this was over some of the terms as well as the fact that the Scheme applied to the contract. He also placed emphasis on the fact it was common ground that the adjudication

rules under the Scheme governed this particular adjudication (as was the case). To that extent (and as explained below) he rightly distinguished this case from the facts of *Ecovision v Vinci* [2015] EWHC 587. He went on to say, however, that this case was much closer to *RMP v Chalcroft* [2015] EWHC 3737, also discussed below. I agree that this case is closer to *RMP* but it is not identical to it.

The Decision

40. It is important to see what was in dispute by the time the adjudicator had to make his decision:

    (1) Claim 1: as noted above, this was agreed;

    (2) Claim 2: the only issue here was whether the 0.5% fee was calculated by reference to the intended value of the Property or the total construction cost;

    (3) Claim 3: the total amount claimed here was £1,417,729.46. The only issue of principle was whether Grandlane had to pay the relevant third party before claiming payment from Skymist.

Claim 2

41. The adjudicator referred to the fact that Skymist relied on a footnote at page 40 of the DOA which expressed the 0.5% as a percentage of total construction costs, as did the TC. Grandlane contended that it had always been the intention of the parties to make this reference to gross development value and if the DOA did not reflect that, it should be rectified. But the adjudicator found that both parties had always agreed the 0.5 percentage in the terms in which it was expressed in the footnote and in the TC. Thus Grandlane was entitled only to £62,000 plus VAT. That finding did not entail accepting the DOA as the contract.

Claim 3

42. Here the adjudicator referred to the fact that Skymist had said that Grandlane had accepted the TC and that Skymist had also relied on the DOA. But looking at those documents, neither of them imposed an obligation on Grandlane to have paid any of the relevant third parties first. Accordingly, he rejected Skymist's general point here. Again, that (negative) finding did not entail accepting the DOA as the contract.

The PTP Claim

43. Of all the third-party claims that went to make up the totality of Claim 3, the most significant by a long way was that in respect of PTP Architects London Limited ("PTP") where the amount charged as against Grandlane, which Grandlane sought to recover as against Skymist, was £1,054,175.72 plus VAT. This therefore formed the largest single item of Grandlane's claim as a whole. For a variety of reasons, Skymist said that only £108,234.17 was due.

44. One of Skymist's arguments was that the necessary approvals for the incurring of the costs by Grandlane had not been given. But on the facts, and in particular by reference to the budgeting evidence, the adjudicator found that Skymist had approved all the sums identified in the budget for PTP just as it had approved the use of PTP in the first place. See paragraphs 124-131 of the Decision. Yet again, that finding did not entail accepting the DOA as the contract. By way of example the TC required approval before payment of third parties.

45. A second point was that PTP's claim as against Grandlane had been made on 17 July 2018 i.e. long after the termination by Skymist of the contract with Grandlane on 27 October 2017. The sum subsequently claimed by PTP was £934,075 plus VAT. Skymist contended that in truth this could only have been a claim by Grandlane in damages consequent upon the termination. An allied point was that PTP's claim was made after termination so that it could not represent fees due as at the date of termination. Grandlane disagreed and said that all the fees for PTP which it claimed related to work done up to but not beyond termination, irrespective of when PTP invoiced for them.

46. The adjudicator found that the sums claimed did fall within the contract between Skymist and Grandlane - not because they were the cost of bringing the performance of PTP or indeed Grandlane to an end i.e. costs consequential upon the termination - but rather because they were PTP'S fees which had been incurred before termination. Here he referred to clause 12.3 of the DOA and said that Skymist's liability was for the fees earned up to termination whether or not previously charged. See paragraphs 155-159 of the Decision. While there is that direct reference to part of the DOA, a right to claim for services performed up to the date of termination was probably the correct analysis anyway and in addition, again, any finding here did not entail acceptance of the DOA as a whole as the governing contract.

47. The adjudicator then made further points at paragraphs 163-167. He said that just because PTP had claimed the relevant fees after termination it did not follow that Grandlane's claim in respect of them was really a claim for damages which it was not entitled to bring. He also made the point that just because Grandlane's appointment had been terminated, it did not follow that the contract ceased to operate in terms of calculating remuneration. He said this was the effect of the termination provisions of the DOA. But again, this was likely to have been the contractual position anyway and once more, did not entail finding that the DOA as a whole, governed.

48. The adjudicator then dealt at length with (and dismissed) Skymist's arguments on the quantum of the appropriate fees for the period up to termination. As a result he found for Grandlane on the PTP part of Claim 3.

49. The adjudicator also appended to his Decision Skymist's submissions on jurisdiction and his letter rejecting them.

Skymist's Counterclaim

50. For the sake of completeness, it is right to say that Skymist made a counterclaim based on breaches of contract by Grandlane which it said entitled it to damages. This was rejected by the adjudicator on the basis that Grandlane had not been in repudiatory breach and if Skymist was arguing that it had a right to terminate at will (which it did in the alternative) the exercise of any such contractual right did not generate a claim for damages against the other party. None of this required finding that the contract was, or was mainly (to include the Clause) the DOA.

THE LAW

Adjudication Decisions without jurisdiction

51. This deals with the first way in which Skymist puts its case. In *Ecovision*, HHJ Havelock-Allan QC comprehensively reviewed the authorities in this area. The particular issue in the

case before him was not about two competing contracts. Rather it was about the proper construction of the relevant contract. An adjudication clause stated that the adjudicator was to be the President or (if he was not available) the Vice-President of the RICS. As neither was available the sub-contractor claimant simply asked the RICS as an adjudicator nominating body to appoint someone else which it did. That adjudicator subsequently made a decision in circumstances where the defendant contractor did not participate substantively in the adjudication. However, on a true analysis, a detailed adjudication provision (including appointment by the Chairman of TeCSA) contained in the main contract was to be implied into the sub-contract which meant that the appointment made under paragraph 2 (1)(c) of the Scheme (as if there were no governing contractual provisions) was incorrect. Accordingly, the adjudicator had had no jurisdiction. The summaries of the cases referred to below are taken from the judgment in *Ecovision*.

52. In *Pegram v Tally* [2003] EWCA Civ 1750, the jurisdiction challenge arose at the stage of enforcement of the adjudication by way of summary judgment. The Court of Appeal held that there was an arguable case that the adjudicator had no jurisdiction because on the defendant's case, there was no contract at all. If so, then the adjudication regime would not apply. However, as Judge Havelock-Allan QC noted, an absence of jurisdiction could arise in other ways too. For example, in *Lead Technical v CMS Medical* [2007] EWCA Civ 316, the issue here was the allegedly wrong appointing body and allied to that, the wrong set of adjudication rules. On that basis, the Court of Appeal said that there should not have been summary judgment so as to enforce the adjudication.

53. There was then the case of *Twintec v Volkerfitzpatrick* [2014] EWHC 10. Here, the claimant sought injunctive relief to prevent the intended adjudication taking place. The facts were the opposite to those in *Ecovision* in that the adjudicator had been appointed by the President of the RICS according to a particular contractual provision. However, the claimant contended that this provision did not form part of the contract. If the claimant was right, there were no specific provisions dealing with adjudication and the application should be made under the Scheme pursuant to paragraph 2 (1) (c). Edwards-Stuart J made a final decision on the contractual issue and agreed with the claimant. As a result he granted the injunction stopping the adjudication. It is to be noted that he did so even though in that case, the appointment could have been by the RICS in any event. Hence it was argued by the defendant that the grant of any injunction would be to promote form over substance. However, Edwards-Stuart J said that:

> "Whilst, at a practical level, I have some sympathy with this submission, I cannot accept it because the validity of the procedure by which the adjudicator was nominated goes to the heart of his jurisdiction."

54. Accordingly, to say that on any footing an adjudicator would be appointed, or would be appointed by the same appointing body is not a sufficient answer where the wrong route to the appointment has been taken. There is a limit, however. Thus, in *RMP v Chalcroft* [2015] EWHC 3737, there were competing versions of the contract but since neither of them contained any specific adjudication provisions, the only route to adjudication was the same - applying to a nominating body pursuant to the Scheme and paragraph 2(1) (c). Accordingly, the jurisdictional challenge made in that case in the context of an application for summary judgment to enforce the decision, was rejected.

55. But all of that said, it will obviously be a question of fact and analysis in each case as to what the "correct" route was, and whether the actual appointment was at odds with it.

Approbation and Reprobation

56. The relevant principles, in the context of adjudication, were explained by Ramsey J in *PT Building Services v ROK Build* [2008] EWHC 3434. Here, the defendant to an application for summary judgment to enforce the decision challenged the jurisdiction of the adjudicator. However, it was precluded from so contending because it had previously affirmed the validity of the appointment of the adjudicator when seeking to challenge the jurisdiction of another adjudicator appointed subsequently which later adjudication was then discontinued.

57. After reviewing the authorities he said this in paragraph 26 of his judgment:

> "In my judgment the underlying decisions on election or approbation and reprobation, as applied in the context of adjudication, show that a party cannot both assert that an adjudicator's decision is valid and at the same time seek to challenge the validity of the decision. The party must elect to take one course or the other. By taking a benefit under an adjudicator's decision, the party will generally be taken to have elected a particular course and will be precluded from challenging the adjudicator's decision. In Macob the benefit was the claim to have the proceedings stayed to arbitration in relation to the decision. In Shimizu the benefit was the right to have the decision corrected under the slip rule."

58. That there had to be a benefit by the party sought to be precluded from reprobating an earlier act was also made clear by the decision of the Court of Appeal in *Banque des Marchands v Kindersley* [1951] 1 Ch. 112. In that case the defendants had proved in the liquidation of the bank for money said to be owed by it to them but that proof was rejected. The liquidator then sued the defendants for monies owed to the bank and in that context, the defendants sought a declaration that the bank did not in fact exist. On those facts, it was held that the defendants were not precluded from seeking that declaration as at that stage. If they obtained the declaration then they would be unable thereafter to prove or recover in the liquidation because that would go against the finding that they obtained that the bank did not exist. On the other hand, if they did not obtain that finding but instead, for example, succeeded in a substantive defence against the claim being made by the bank, they would not be precluded from proving in the liquidation.

59. At p119 of the judgment, Evershed MR stated that:

> "from the authorities cited to us it seems to me to be clear that these phrases ["approbating and reprobating" .. "blowing hot and… cold"] must be taken to express, first, that the party in question is to be treated as having made an election from which he cannot resile, and second, that he will not be regarded, at least in a case such as the present, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent."

60. Another relevant case is *Pilon v Breyer* [2010] EWHC 837. There were numerous reasons why the application for summary judgment to enforce the decision should be dismissed but one of them involved A/R. As Coulson J (as he then was) stated in paragraph 35 of his judgment:

> "there is a further fundamental difficulty in the way of this part of Pilon's case. This is Pilon's application to enforce the adjudicator's decision. It is therefore inherent in Pilon's application that the adjudicator was right. However, on this particular point, they wish to argue that the adjudicator was wrong, and that the court should substitute its own view for that of the adjudicator…. Such an approach would in my judgment amount to the clearest possible case of approbation and reprobation. There is

clear authority that such an approach is simply impermissible on an application to enforce an adjudicator's decision: see ..*Durtnell.. v Kaduna*..[2003] EWHC 517."

61. In the light of those cases, the following principles apply, in my judgment:

(1) The approbating act or conduct in question needs to be clearly defined and unequivocal. Since it is fair to see the "doctrine" of approbation and reprobation as a species of election or a form of estoppel since the result is to preclude the relevant party from now making a particular argument or taking a particular course of action, the familiar requirement of "clear and unequivocal" should apply here too. It seems to me that this is also echoed in *Banque des Marchands* when Eversheed MR referred to the approbation which prevented the later reprobation as being "an election from which he cannot resile". See also, paragraph 6.05 of Wilken and Ghaly's *"The Law of Waiver, Variation and Estoppel, third edition*"; it also has the practical advantage of enabling a proper comparison to be made with the later allegedly reprobating act, to see if the latter is truly inconsistent with the former;

(2) Second, the party in question must gain a benefit from the approbation. Although *Wilken* does not specifically make this point, it is well-established by both *Banque des Marchands* and *ROK*. It also makes sense because, reflecting the general context of election and estoppel, if there was no benefit, it is not clear why it would be unjust to the other party to allow the first party later to "reprobate";

(3) Finally, the reprobating act must be clearly inconsistent with the earlier approbation, and this will entail (for the same reasons as are set out in sub-paragraph (1) above), that the reprobating act itself must be clear and unequivocal.

62. As noted above, in the adjudication context if an A/R argument is successful, it will preclude the relevant party from either seeking to challenge a decision or alternatively enforce it. But whatever it is, the essential feature is some position taken on a decision which means that the party is not permitted to simply reverse out of the position previously taken. This case is unusual because Skymist is not suggesting that Grandlane took any prior position in respect of any decision. There was no decision arising from the first adjudication because it was withdrawn, and there was no decision on the second adjudication at the time when Skymist contends that the A/R was complete, as it were.

63. Rather, in this case, it is said that the "thing" approbated is the DOA as a complete contract (thereby including of necessity the Clause) or alternatively a contract without the Clause. I have serious doubts as to whether A/R can ever be used in this way. The usual contractual context for the doctrine of election is not this but the affirmation of the contract in question following, for example, a repudiatory breach, so that the latter remedy of terminating it by accepting that breach is lost. However, for present purposes, I will assume that this kind of A/R is possible in principle.

ANALYSIS

The Decision

64. I would make some general observations first:

(1) it is plain that Grandlane was not contending that the contract was contained in the DOA even if not signed; that is clear from a fair reading of the NOA and the Referral, as explained above; nor did Grandlane need to;

(2) nor was Grandlane contending that the contract was wholly evidenced by the DOA; again, it did not need to;

(3) for the most part, the key terms in play were agreed between the parties anyway;

(4) to some extent, it is fair to say that both parties cherry-picked to a greater or lesser extent from the DOA; not because it was agreed as the contract but because certain parts of it were simply uncontroversial and had been agreed from an early stage, i.e. they simply evidenced parts of the agreement which were already concluded; the fact that as a matter of pure contractual analysis some of the points made might not be wholly correct does not matter for present purposes;

(5) it was therefore not necessary for the adjudicator to make any detailed or comprehensive findings as to the particular contract actually made here, given the narrow contractual (as opposed to factual) issues that arose. In particular, the adjudicator at no point made a finding that the DOA as a whole was the contract between the parties.

65. If one then considers the salient parts of the Decision:

(1) Claim 1 did not require any findings because it was agreed;

(2) Claim 2 did, but the adjudicator's decision did not depend on any finding that the DOA was agreed; whether one looked at the TC or the DOA the wording for the 0.5% fee was the same;

(3) As for Claim 3,

(a) the issue as to whether Grandlane could recover fees which it had not yet itself paid to Skymist did not turn on any particular finding as to the governing contract; the point was that there was simply nothing in the documents to suggest that condition;

(b) as to whether Grandlane's claim was truly one in debt or rather for damages, in truth this was no more than stating the fairly obvious point that if it could be shown that certain fees had accrued by a particular date, because of the work done by that date, it did not matter that the third party may not have invoiced them until later; put another way, it was not right to say that the only claim for fees claimed later would have been in damages;

(c) it is true that the adjudicator did invoke clause 12.3 of the DOA but it probably was not necessary and again it does not say anything about what other terms of the DOA applied, unsurprisingly because he did not need to decide the point.

66. It is quite true that there are scattered references by the adjudicator to Grandlane relying upon the DOA. He also suggested that Skymist did the same. None of that matters because the key question is whether, ultimately, the adjudicator found that there was a contract which contained sufficient of the DOA's terms to include the Clause. In my view, looking at the Decision as a whole, he did not.

67. Accordingly, since he did not find that the contract (whatever it was) contained the Clause, there was no bar to his jurisdiction having arisen from a simple reference to the RICS pursuant to paragraph 2 (1) (c) of the Scheme. Put another way, his findings are not inconsistent with the route by which jurisdiction was conferred upon him. That being so, the Decision was not a nullity on that basis.

Approbation and Reprobation

68. Skymist's case in detail is that Grandlane:

(1) Approbated the DOA (necessarily including clause 14.2(b)) in the NOA and then reprobated the DOA (clause 14.2(b)) when procuring and obtaining a nomination by RICS;

(2) Approbated the DOA (necessarily including clause 14.2(b)) in the Referral while having reprobated the DOA (clause 14.2(b)) when procuring and obtaining a nomination by RICS;

(3) Approbated the DOA (necessarily including clause 14.2(b)) when claiming that Mr Riches' Decision is binding while having reprobated the DOA (clause 14.2(b)) when procuring and obtaining a nomination by the RICS;

(4) Put another way, approbated a contract without clause 14.2(b) when procuring - and obtaining - the nomination of an adjudicator by the RICS and reprobated such a contract in its NOA and Referral as well as when claiming that Mr Riches' Decision is binding.

69. As to the first way in which the argument is put (i.e. in paragraph 68(1)-(3) above), I do not accept that Grandlane approbated the DOA in its entirety, either in its NOA or Referral. I have set out above why I take this view. In summary, when read fairly and in substance, Grandlane did not suggest, let alone clearly suggest, that its case was founded upon the DOA as a whole or upon a contract which included all or even most of the terms in the DOA including the Clause. The lack of clarity in some parts of the NOA and the Referral does not alter that conclusion. Nor was it impossible or implausible for Grandlane not to have so founded its case. It simply did not need to, as confirmed, in my judgment, by the Decision. Equally, to claim (now) that the Decision is (temporarily) binding does not approbate the DOA (as including the Clause) because the Decision did not decide that this was the relevant contract – see above.

70. That being so, there was no "reprobation" when Grandlane required RICS to nominate an adjudicator. It would be particularly surprising if, on a proper analysis, Grandlane had sought to rely upon the DOA in that way since it had agreed to withdraw the first adjudication precisely because (among other things) Skymist had challenged it on the basis of Grandlane's invocation of the Clause where the relevant contract was said to be contested.

71. Those findings are sufficient to dispose of the first way in which A/R is put. However, in my view, an additional reason is that Grandlane did not gain a "benefit" from these acts of purported approbation, because they did not actually lead to anything.

72. The same result applies to the second way in which the A/R argument is put (see paragraph 68(4) above). I agree that following the withdrawal of the first adjudication, Grandlane was indeed proceeding on the basis that whatever the contract was, it did not include the Clause. But for the reasons already given, it did not then reprobate that "thing" when it made its substantive submissions in the NOA or in the Referral. And again, nor did it benefit from this. Its only benefit was an appointment of an adjudicator which appointment was bound to happen anyway. The fact that the particular adjudicator chosen by RICS was not to Skymist's liking is hardly to the point, and could not properly be described as a "benefit". It was not suggested (nor could it be) that Mr Riches was not impartial or independent.

73. I should add that at one stage in the argument, Skymist placed emphasis on the fact that Grandlane's solicitors relied on the arbitration provision within Clauses 14.4 and 14.5 of the DOA. But this was only in a letter dated 16 August, i.e. before even the referral in the first adjudication. This does not support Skymist's A/R case.

74. Accordingly, however it is put, the A/R part of Skymist's claim must fail and with it, the claim as a whole.

Further Observations

75. I would make the following further observations although they are not necessary for my decision.

76. The irony of this case is that if there is any A/R here, it is in my view to be found in the actions of Skymist. It took a clear and unequivocal position following the request to CIArb that Grandlane could not make that request because it could not rely upon the Clause since the DOA was contested. On that footing it was also positing (for there was no other alternative) that the only method of appointment was pursuant to paragraph 2 (1) (c) of the Scheme i.e. to approach an adjudicator nominating body direct. It gained a benefit from this which was to stop the adjudication.

77. It then reprobated that position when, in the current challenge, it took the position that Grandlane could not seek an appointment in this way <u>because</u> it should have sought it pursuant to the Clause. So if any party should now be precluded from taking the position now advanced, it is Skymist not Grandlane.

78. In the light of what have now been two separate jurisdictional challenges to each of the adjudicators so far nominated, it is worth asking, by way of a reality check, what, precisely, Skymist contends that Grandlane should have done, or should do now, in order to appoint an adjudicator validly in circumstances where both sides are agreed that whatever the contract, the dispute must be referred to adjudication.

79. Mr Choat, for Skymist says that Grandlane could not go back and seek a nomination from CIArb pursuant to the Clause because that would entail a contract to which Skymist contended (and still contends) that it is not a party. That, of course, was part of Skymist's challenge to the first adjudication. Rather, Mr Choat suggested that Grandlane could and should still apply to the CIArb to nominate an adjudicator but not <u>pursuant to</u> the Clause. In other words the course now suggested for Grandlane would still involve an adjudication pursuant to paragraph 2 (1) (b) as opposed to one pursuant to paragraph 2 (1) (c). That is because even though

Skymist contends that it is the wrong contract, Grandlane could still rely upon it for the purpose of seeking a nomination since there was a "nominating body named in the contract". I have to say that I am quite unable to follow this. If, as Skymist contends, Grandlane could not invoke the Clause so as to request CIArb to nominate an adjudicator because the existence of the relevant contract was in issue, that would seem to me to be the end of the matter so far as the application of paragraph 2 (1) (b) is concerned; instead it would inevitably entail the operation of paragraph 2 (1) (c). Grandlane could not "hang on to", as it were, paragraph 2 (1) (b) by somehow not relying on the Clause and yet relying upon the fact that there was a nominating body named in the contract - which of course is there by virtue of the Clause. There is simply no "third way" as suggested by Skymist. On Skymist's case therefore, this dispute is incapable of adjudication, even though it must be adjudicated upon, unless the parties were able in effect to agree an *ad hoc* adjudication. This would be a very curious state of affairs.

80. Finally, it is of the utmost importance that the adjudicator's jurisdiction is firmly established even though, as a matter of substance, his decision is only temporarily binding. But that does not mean that the Court should be required to engage in highly technical (but legally unmeritorious) arguments in what effectively becomes satellite litigation in the context of a form of dispute resolution that is meant to be speedy and efficient. In that sense, I would respectfully endorse the observations made by Mr Justice Stuart-Smith in paragraph 23 of his judgment in *Purton* (and repeated in paragraph 51 of his judgment in *RMP*) that referring a matter to adjudication should not be "a formalistic obstacle course akin to 18th century forms of action, where one slip may put a party literally out of court". Far better to spend the available time and money on litigating out the dispute subsequently if it really cannot be resolved.

CONCLUSION

81. Accordingly, Skymist's claim must be dismissed. I am most grateful to counsel for their helpful and comprehensive submissions.