Neutral Citation Number: [2020] EWHC 90 (TCC)

Case No: HT-2019-000363

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2020

Before :

VERONIQUE BUEHRLEN Q.C
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

MPB	**Claimant**
- and -	
LGK	**Defendant**

- -
- -

Mark Chennells (instructed by **Systech Solicitors Ltd**) for the **Applicant**
Michael Wheater (instructed by **direct access**) for the **Respondent**

Hearing dates: 14 January 2020

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Approved Judgment

VERONIQUE BUEHRLEN QC :

1. This is an application to set aside a Tribunal award on jurisdiction dated 12 September 2019 ("the Award") pursuant to section 67 of the Arbitration Act 1996 ("the Act") on the grounds that there was no arbitration agreement between the parties, such that the Tribunal had no substantive jurisdiction over the dispute referred to it.

2. The application is concerned with whether the contract incorporated clause 11 of the Respondent's ("LGK") standard terms and conditions which made provision for the resolution of disputes by adjudication followed by arbitration under the Construction Industry Model Arbitration Rules ("CIMAR"). It is common ground that if incorporated into the Contract, clause 11 is a written agreement to arbitrate.

3. If clause 11 is not incorporated into the contract, LGK rely on the doctrine of approbation and reprobation as prohibiting the Applicant ("MPB") from challenging the incorporation of clause 11.

Background

4. MPB is a building contractor. It was engaged on a project at King's Court in Primrose Hill, London NW3. LGK are suppliers and installers of structural steel work. In about April/early May 2016, the parties entered into a contract for the supply and installation of structural steel work to MPB's project ("the Contract"). The evidence surrounding the formation of the Contract is incomplete. What is known or common ground follows.

5. On 29 March 2016 MPB requested a quotation for the structural steel work required for the project. In so doing MPB provided LGK with a table setting out a description of the work with columns for LGK to complete for rates and total prices. By email dated 6 April 2016 LGK provided quotation no. Q17729 Rev A to MPB. The email refers to an original quote no. Q17729 dated 23 October 2015. I have not seen copies of either of these quotations.

6. Following a request from MPB for additional items to be priced, LGK provided MPB with a further revised quotation dated 11 April 2016: Quotation Q17729 Rev. B ("the Quotation"). It is common ground that the Quotation was accompanied by LGK's standard terms and conditions of contract ("LGK's Terms").

7. A site meeting followed between the parties on 12 April 2016 together with email correspondence dated 13 April 2016 in which LGK provided MPB with further pricing and information as to the scope of work. LGK's email dated 13 April 2016 confirmed LGK's price for the steelwork at £92,500.

8. On the same day, that is 13 April 2016, MPB issued a document entitled "Sub-Contractor Order" no. MP761/05. Again no copy of that document was provided to the Court. However, LGK responded by email dated 15 April 2016 raising a number of points in relation to the order and concluding "[t]rust these points are helpful and agreed". MPB replied by email dated 28 April 2016 agreeing the majority but not all of the matters raised by LGK. What is agreed by both parties to be the final version of order no. MP761/05 includes certain manuscript annotations including a reference

to MPB's email of 28 April 2016. I refer to this final version of the document as "the Order".

9. The first material part of the Order set out a table comprised of columns entitled "Description of Work" and "Value". Included in the table is the statement "based on quotation Q177129 Rev B dated 11/04/2016, meeting minutes dated 13/04/2016 and subsequent e-mail correspondence dated 13/04/16".

10. The Order then went on to state:

> "All Subcontract Orders are placed in conjunction with PM Appendix 1 Subcontract Order Notes and are deemed to take precedence"

Appendix 1 comprised MPB's standard terms and condition ("MPB's Terms") including a provision by which:

> "Sub-contractors shall allow for all works in accordance with the documentation as stated on the order."

11. Under a further section entitled "Terms" the Order went on to state:

> "The work to be executed in accordance with our Terms and Conditions ~~and those of the main contract – it is required that you withdraw any of your conditions which are at variance with the conditions contained therein~~ *" (original strike through)

The * was referred to at the bottom of the Order coupled with a manuscript annotation stating:

> "See attached email MPB 28 April 2016 11.01 Appendix 1 Point 1"

Point 1 stating that LGK had not been provided with a copy of the main contract.

12. I was informed at the hearing that the parties believe that the manuscript annotations (including the deletions) were made by LGK. The Order is unsigned. The works commenced in May 2016.

13. In the event, the parties fell out and MPB engaged other contractors to complete LGK's works. A series of adjudications followed. The first two adjudications were commenced by LGK. The third adjudication (to which I refer below as Adjudication no. 3) was commenced by MPB. It was commenced with reference to clause 11 of LGK's Terms. By clause 11:

> "The Contractor and Customer agree that either party may refer a dispute to adjudication at any time, following the rules and procedures of the Scheme for Construction Contracts Part 1 (the Scheme). The Decision of the Adjudicator shall be binding on the parties until the dispute is finally resolved through agreement for by Arbitration under the CIMAR rules."

14. Adjudication no. 3 resulted in Mr Riches holding that LGK's account under the Contract was in the sum of £135,103.43 and that MPB was entitled to recover £76,056.67 once remedial / completion work was taken into account. Successful enforcement proceedings followed.

15. The fourth adjudication was also commenced by MPB but is not pertinent to the matters at hand.

16. LGK commenced arbitration proceedings in relation to Mr Riches' decision in Adjudication no. 3 by Notice dated 5 July 2019. MPB immediately took issue with jurisdiction. Without prejudice to MPB's position on jurisdiction, the parties agreed to appoint Mr Jonathan Cope as arbitrator. Following the exchange of submissions on jurisdiction, Mr Cope issued his award on jurisdiction on 12 September 2019. He held that there was an arbitration agreement through the incorporation of clause 11 of LGK's Terms into the Contract and that therefore he had substantive jurisdiction over the parties' dispute.

Issue 1: Did the Contract incorporate clause 11 of LGK's Terms?

The Law

17. The application has been brought under section 67(1)(a) of the Act ("challenging any award of the arbitral tribunal as to its substantive jurisdiction") and asks that, in line with section 67(3)(c) of the Act, the Court set aside the Award. It is common ground that a challenge under section 67 proceeds by way of a *de novo* rehearing of the jurisdiction issues. The proper approach was helpfully recently summarised by Butcher J in *The Republic of Korea v Mohammad Reza Dayyani & Ors* [2019] EWHC 3580 (Comm) at [26] in these terms:

> "A challenge under s. 67 proceeds by way of a *de novo* rehearing of the jurisdiction issue(s). The award of the arbitrators has no automatic legal or evidential weight. Nevertheless, and given that the arbitral tribunal has considered the same issues, the Court will examine the award with care and interest. If and to the extent that the reasoning is persuasive, then there is no reason why the Court should not be persuaded by it."

18. By section 6 of the Act:

> "(1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).
>
> (2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement."

19. Since this is a case that falls within category 1 of Christopher Clarke J's four categories in *Habas v Sometal* [2010] EWHC 29 (Comm), that is a case in which A and B made a contract in which they incorporate standard terms, the Court will apply

the usual approach to the incorporation of terms considering what, as a matter of construction, the parties intended. In turn, the proper approach to questions of contract construction is well known. Quoting the passage at paragraph 15 of Lord Neuberger's judgment in *Arnold v Britton* [2015] UKSC 36:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101* , para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions... "

20. In the context of the incorporation of the terms of one document into another, further guidance was given by Rix LJ in *Tradigrain SA v King Diamond Marine* [2000] 2 All ER (Comm) 542 at [78], as more recently applied by the Court of Appeal in *TJH and Sons Consultancy Ltd v CPP Group plc* [2017] EWCA Civ 46, per Lewison LJ at [13] to [14]:

> "The first rule relating to the incorporation of one document's terms into another document is to construe the incorporating clause in order to decide on the width of the incorporation … A second rule, however, is to read the incorporated wording into the host document in extensor to see if, in that setting, some parts of the incorporated wording nevertheless have to be rejected as inconsistent or insensible when read in their new context."

The parties' submissions

21. MPB submit that on proper construction of the Contract, the words "based on quotation Q17729 Rev B dated 11/04/2016" did not serve to incorporate LGK's Terms. In particular, MPB rely on the documentary context of the words together with the language used. They submit that the Order addresses the description of the work and the terms on which the work was to be executed separately and that the reference to the Quotation forms part of the section concerned with the description of the work. They rely on the fact that the section entitled "Terms" states that "[t]he work to be executed in accordance with our [i.e. MPB] terms and conditions" without reference to LGK's Terms. MPB submit that whilst LGK's Terms were included with the Quotation they did not form an integral and indivisible part of it in that they were additional to the 4 page Quotation itself. They rely on the words "based on" to mean that the preceding description of the work is based on the documents referred to. They also submit that it is inherently unlikely that the parties would have intended to

agree to the inclusion of two sets of standard terms and the risk of subsequently having to reconcile them.

22. MPB also submit that LGK's reliance on the reference to "precedence" in the Order is misplaced. The relevant wording reads:

> "All Subcontract Orders are placed in conjunction with MP Appendix 1 Subcontract Order Notes and are deemed to take precedence"

MPB submit that on true construction of this wording it is the Order that is to take precedence over other contractual documents.

23. Further, if (contrary to MPB's primary case) LGK's Terms were incorporated into the Contract, MPB submit that it was subject to MPB's Terms taking precedence and that those terms prevent the incorporation of the arbitration agreement. The point being that in the absence of an arbitration agreement in MPB's Terms, the parties are entitled to bring their disputes before the Courts in the ordinary way. The effect of giving precedence to MPB's Terms is therefore to preserve the right to go to Court.

24. LGK submit that on proper construction of the Contract, the Order incorporated LGK's Terms. They argue that it was both the description of the work and value that were "based on" the various contractual documents listed in the Order and that one cannot sever LGK's Terms from the first 4 pages of the Quotation. They make the point that LGK's Terms are relevant to both the scope of work and the price. They construe the words "[a]ll Subcontract Orders are placed in conjunction with MP Appendix 1 Subcontract Order Notes and are deemed to take precedence" as meaning that MPB's Terms were to take precedence over LGK's Terms. They also rely on the deletion by LGK of the words "It is required that you withdraw any of your conditions which are at variance with the conditions contained therein" as a refusal on the part of LGK to withdraw any of its terms. As MPB's Terms were silent as to dispute resolution, the arbitration agreement in LGK's Terms applies and the Arbitrator therefore has the requisite jurisdiction.

The Award

25. The Arbitrator accepted that LGK's Terms formed part of the Contract but that MPB's terms took precedence in the event of incompatibility. In particular, he accepted that LGK's Terms were *prima facie* express terms of the Contract on the basis that these were attached to the Quotation which was expressly referred to in the Order. There was no need to refer to LGK's Terms separately because these were an integral part of the Quotation. He rejected the submission that anything turned on the fact that the Quotation was referred to in the Order under the heading "Description of Work". He agreed with LGK that the natural and ordinary meaning of *"… All Subcontract Orders are placed in conjunction with MP Appendix 1 Subcontract Notes and are deemed to take precedence …"* was that MPB's Terms should take precedence, not (as had been submitted by MPB) that any other terms and conditions were excluded.

26. The Arbitrator then went on to the find that the arbitration agreement set out in clause 11 of LGK's Terms was valid and binding on the parties. He concluded that since

MPB's Terms were silent on how disputes should be resolved there was no incompatibility with the arbitration agreement in clause 11 of LGK's Terms and that therefore clause 11 applied. Finally, the Arbitrator rejected MPB's submission as to the relevance of section 6(2) of the Act on the grounds that LGK's Terms were express terms of the Contract. However, if wrong about that, he went on to hold that if the arbitration agreement was only incorporated by reference then that reference was "*such as to make that clause part of the agreement*".

Discussion

27. Despite Mr Chennells' very able submissions, I have come to the conclusion that LGK's Terms were incorporated into the Contract for the reasons set out below.

28. MPB's Sub-Contractor Order dated 13 April 2016, as subsequently amended by LGK in manuscript, sets out the parties' agreement. The Order includes a Table comprised of two columns one entitled "DESCRIPTION OF WORK", the other "VALUE". Following four entries describing the works, the words "[b]ased on quotation Q17729 Rev B dated 11/04/2016, meeting minutes dated 13/04/2016 and subsequent e-mail correspondence dated 13/04/16" appear in the Table. The question is whether those words are sufficient (in the sense of wide enough) to incorporate LGK's Terms into the Contract.

29. It is common ground that the Quotation was provided by LGK to MPB together with LGK's Terms. Although not expressly referred to in the first 4 pages of the Quotation, MPB were therefore given clear notice of LGK's Terms. Further, the scope of work and price set out in the first 4 pages of the Quotation were clearly based on, and to be read in conjunction with, LGK's appended terms and conditions. It follows that LGK's Terms formed part of the Quotation and were an integral part of it. That conclusion is further supported by the fact that the email correspondence refers to the quotation attached and not to the quotation together with LGK's Terms.

30. Further, I agree with LGK's submission that on their natural and ordinary meaning the words "[b]ased on Quotation Q17729 Rev B" mean based on the Quotation as a whole and therefore based on the Quotation including LGK's Terms. The wording cannot on its face be a reference to only part of the Quotation as contended for by MPB. These words are therefore wide enough to incorporate LGK's Terms into the contract. I also agree with LGK that the words "based on" should not be given too narrow or legalistic a construction. This was a contract negotiated and drawn up by two construction companies and not a document prepared by lawyers. In short in my view a reasonable person having all the background knowledge which would have been available to the parties would have understood the express reference in the Order to "based on quotation Q17729 Rev B dated 11/04/2016 …" as being a reference to the Quotation and as meaning that the Quotation was intended to form part of the Contract.

31. While I accept MPB's submission that I should take into account the documentary context of the wording of incorporation, that is the position of the wording in the document together with the surrounding provisions I do not accept that the reference to the Quotation was limited to the description of the work. The table deals with both the description of the work and the price as well as other contract provisions. For instance, the table includes a reference to "collateral warranty – to be provided prior

to payment". That is a term as to the timing for the provision of the warranty and not solely a reference to an item of work forming part of the description of the work.

32. Further, I do not regard it as reasonable or practicable to seek to limit the reference in the Order to the Quotation to parts of the Quotation going to the description of the work. This would lead to significant difficulties in then determining which of the provisions of the Quotation, including LGK's terms, were relevant to the description of the work and which were not. I say including LGK's Terms because some of those terms are relevant to the description of the work such as clause 2(e) in relation to the number of general arrangement drawings LGK would produce. It cannot therefore have been the parties' intention to incorporate only part of the Quotation without clearly identifying which part.

33. It is correct that under the section entitled "Terms" it is stated "[t]he work to be executed in accordance with [MBP's] Terms and Conditions". However, those words alone are not apt to exclude LGK's Terms when the Order also makes express reference to the scope of work and price being based on the Quotation which in turn included LGK's Terms. That conclusion is further supported by the provision in the Order that "[a]ll Subcontract Orders are placed in conjunction with MP Appendix 1 Subcontract Order Notes and are deemed to take precedence." Appendix 1 being MPB's Terms. The parties disagreed as to how this further provision should be construed. I agree with LGK that the natural and ordinary meaning of this wording is that the Order was placed in conjunction with MPB's Terms and that MPB's Terms are to take precedence over any other terms and conditions. Although the sentence could be read as meaning that it is the Order that is to take precedence that would then beg the question over what? MPB suggest over other contract documents, but the sentence is not in my view apt to be construed as attempting to set the order of precedence of various contractual documents. The more obvious and natural meaning is that it is MPB's Terms that are to take precedence over any other terms.

34. My conclusion is also supported by the fact that by clause 2(a) of the MPB Terms LGK were required to "allow for all works in accordance with the documentation as stated on the order". The documentation as stated on the Order included the Quotation of which LGK's Terms formed part.

35. LGK also relied on the fact that they had deleted certain wording from the form of the Order originally provided by MPB to LGK, so that the final version of the Order reads:

> "The work to be executed in accordance with our Terms and Conditions ~~and those of the Main Contract. It is required that you withdraw any of your conditions which are at variance with the conditions contained therein.~~"

36. LGK submit that:

i) When parties use a printed form and delete parts of it, the Court is entitled to have regard to what was deleted as part of the surrounding circumstances in light of which the Court construes the words that remain citing *Mottram Consultants Ltd v Sunley (Bernard) & Sons Ltd* [1975] 2 Lloyds Rep 197 at 209 per Lord Cross; and

ii) Where the parties have deleted certain words, the fact of deletion shows what the parties did not want in their agreement and that whilst the contract must be construed as a whole, there is a prima facie indication that the deleted provision was not required citing *Punjab National Bank v de Boinville* [1992] 1 WLR 1138 per Staughton LJ at 1148.

37. The law as to the circumstances in which the Court may have regard to a deletion was set out by the Court of Appeal in *Narandas-Girdhar and Anr v Bradstock* [2016] EWCA Civ 88 where Briggs LJ said this:

> "18. Mr Wolman submitted that this aspect of the judge's reasoning proceeded on an incorrect assumption that he was entitled to have regard to what was removed by the Modification, in arriving at a conclusion about its purpose. He said that, once the parties to a contractual negotiation agreed to remove certain provisions of a draft and replace them, then those removed provisions fell out of account for the purposes of interpretation.
>
> 19. I disagree. The true position is that summarised by Clarke J (as he then was) in *Mopani Copper Mines plc v Millennium Underwriting Ltd [2008] EWHC 1331 (Comm)* at paragraph 120-123 as follows:
>
> > "120 The diversity of authority, of which Diplock J spoke, renders it difficult for a judge of first instance to recognise when recourse to deleted words may properly be made. The tenor of the authorities appears to be that in general such recourse is illegitimate, save that (a) deleted words in a printed form may resolve the ambiguity of a neighbouring paragraph that remains; and (b) the deletion of words in a contractual document may be taken into account, for what (if anything) it is worth, if the fact of deletion shows what it is the parties agreed that they did not agree and there is ambiguity in the words that remain. This is classically the case in relation to printed forms (*Mottram Consultants, Timber Shipping, Jefco Mechanical Services*), or clauses derived from printed forms (*Team Service*), but can also apply where no printed form is involved (*Punjab National Bank Ltd*).
> >
> > 121 Support for that view may be found in the latest edition of *Keating on Building Contracts* which contains the following passage:
> >
> > 'In this confusion the second school is generally to be preferred. Where parties have made a contract in a document that contains deletions, to look at the deletions does not offend the principle discussed above which prevents reference to preliminary negotiations. The deletion is physically contained in the concluded contract. It is submitted that the court should first construe the retained words. If they are unambiguous, reference to the deletions is unnecessary. If they are ambiguous

> reference to deletions from printed documents should be permitted to see whether objectively they throw light on the meaning of the retained words.'
>
> 122 Even if recourse is had to the deleted words, care must be taken as to what inferences, if any, can properly be drawn from them. The parties may have deleted the words because they thought they added nothing to, or were inconsistent with, what was already contained in the document; or because the words that were left were the only common denominator of agreement, or for unfathomable reasons or by mistake. They may have had different ideas as to what the words meant and whether or not the words that remained achieved their respective purposes.
>
> 123 Further, as Morgan J pointed out in Berkeley Community Villages Ltd v Pullen [2007] EWHC 1330:
>
> 'Even in the case where the fact of deletion is admissible as an aid to interpretation, there is a great difference between a case where a self contained provision is simply deleted and an another case where the draft is amended and effectively re-cast. It is one thing to say that the deletion of a term which provides for "X" is suggestive that the parties were agreeing on "not X"; it is altogether a different thing where the structure of the draft is changed so that one provision is replaced by another provision. Further, where the first provision contains a number of ingredients, some assisting one party and some assisting the other, and that provision is removed, it by no means follows that the parties intended to agree the converse of each of the ingredients in the earlier provision"
>
> 20. For present purposes, the relevant principle is that if the fact of deletion shows what it is the parties agreed that they did not agree and there is ambiguity in the words that remain, then the deleted provision may be an aid to construction, albeit one that must be used with care."

38. I do not think there is any ambiguity in the words that remained following LGK's deletion i.e. in the words "[t] work to be executed in accordance with [MPB's] Terms and Conditions". Any ambiguity does not arise because of the words that remained but because of the reference earlier in the document to the Quotation and to MPB's Terms taking precedence. Accordingly, I do not think this is an instance in which the Court should consider the deleted wording as an aid to construction. However, if I am wrong about that then I still do not think that the deleted words assist LGK.

39. LGK submitted that the words "any of your conditions which are at variance" with MPB's Terms were consistent with LGK's Terms forming part of the Contract and that the deletion was a clear indication that LGK was not required to withdraw any of its conditions and in line with matters of interpretation being dealt with on the basis that MPB's Terms would take precedence.

40. That is one way of construing the deletion. However, there are other reasons why the parties might have agreed the deletion. They might, for instance, have thought that the provision was not necessary and potentially confusing if MPB's Terms were to take precedence in any event. I also note that an explanation for the deletion was given in the manuscript note that refers the reader to Appendix 1 Point 1 of MPB's email dated 28 April 2016 in which LGK made the point that they had not been provided with a copy of the main contract. Accordingly, I do not think that the deletion helps with determining the true construction of the terms of the Contract one way or the other.

41. Finally, I agree with MPB that one should be slow to conclude that the parties agreed that both of their standard terms should apply to the contract given the inevitable risk of contradictions in those terms and resulting potential uncertainty. However, it is not uncommon for construction contracts to be set out in a number of different documents and to contain different sets of standard terms. In some instances, the parties may deliberately not identify a single set of standard terms for fear that the other party will not agree to have its terms excluded. Further, the situation is mitigated where (as in the present case) one set of terms is given precedence over another. Here, the parties did expressly incorporate the Quotation into their agreement and LGK's Terms clearly formed part of that quotation.

42. Given my conclusion on the incorporation of LGK's Terms I now turn to consider the effect of MPB's Terms taking precedence. It is MPB's case that (i) the absence of an arbitration agreement in MPB's Terms entitled the parties to take their disputes to Court; and (ii) that being inconsistent with an arbitration agreement, MPB's Terms should take precedence. I disagree. Whilst the obvious implication where a contract is silent on the matter of dispute resolution is that any dispute will be brought before the Courts, that is not the same as an express dispute resolution provision being set out in MPB's Terms which is inconsistent with a dispute resolution provision set out in LGK's Terms. I agree that the parties should not be lightly taken to have given up their right of access to the Courts. However, I do not see one set of terms incorporating an arbitration clause as inconsistent with another set of terms incorporated into the same contract where no such clause has been included. Certainly that would cause problems in practice where it is common for construction contracts to comprise several contractual documents which are given an order of precedence in case of inconsistency and where only one of the documents down the list contains the arbitration agreement. In my judgment, clause 11 is not inconsistent with MPB's Terms.

43. An agreement for disputes to be resolved by way of adjudication and "… finally resolved through agreement or by Arbitration under the CIMAR rules…" is an agreement to "… submit to arbitration present or future disputes …" within the meaning of section 6(1) of the Act. The Contract therefore included an arbitration agreement and the Arbitrator does have the requisite jurisdiction to determine the Parties' dispute. Like the Arbitrator, in these circumstances I do not think that section 6(2) of the Act is relevant for present purposes. However, if it was it follows for the reasons given above that I would have found that the reference to the Quotation in the Order was such as to make clause 11 part of the contract.

Issue 2: Is it open to MPB to challenge the application of clause 11 of LGK's Terms?

44. In light of my findings on Issue 1, I need not consider LGK's alternative argument based on approbation and reprobation. However, having heard detailed argument on the matter and given that it provides an alternative route to establishing whether the Arbitrator has jurisdiction were I mistaken in relation to my conclusions on construction of the Contract, I set out my conclusions below.

45. In short, it is LGK's case that MPB elected to rely on LGK's Terms and clause 11 for the purposes of Adjudication no. 3 and subsequent enforcement proceedings and that it is therefore not now open to MPB to deny that LGK's Terms and/or clause 11 were incorporated into the Contract pursuant to the doctrine of approbation and reprobation.

The facts

46. MPB served its notice of intention to refer a dispute to adjudication on LGK on 26 September 2017. Paragraph 2.2 of that notice stated that the terms of the Contract were "set out in the Sub-Contract Order dated 13 April 2017 from MPB to [LGK] and the documents referred to in the Sub-Contract Order". Further, under the heading "Appointment of Adjudicator", section 5 of the notice read:

> "5.1 Clause 11 of the terms and conditions appended to [LGK's] Quotation dated 11 April 2017 provides as follows:
>
> "The Contractor and Customer agree that either party may refer a dispute to adjudication at any time, following the rules and procedures of the Scheme for Construction Contracts Part 1 (the Scheme). The Decision of the Adjudicator shall be binding on the parties until the dispute is finally resolved through agreement for by Arbitration under the CIMAR rules."
>
> "5.2 Consequently, either Clause 11 effects an incorporation of the adjudication provisions in the Scheme or under Section 108(5) of the Act the provisions of the Scheme operate as implied terms of the Sub-Contract. The Sub-Contact is silent as to nominating body."

47. By letter dated 26 September 2017, the Adjudicator (Mr Riches) wrote to MPB stating that he did not know which adjudication provisions applied and requesting "a copy of the relevant sections of the contract documents to show what if any Adjudication procedure applies". In reply, Systech Ltd (MPB's solicitors) provided Mr Riches and LGK with the final page of LGK's Terms stating that "[t]he dispute resolution provisions are in Clause 11" and referring to section 5 of their Notice of Intention to Refer to Adjudication (set out above).

48. MPB's Referral Notice followed on 3 October 2017. It identified the contractual documents as including the Quotation and relied on the provision that "[a]ll Subcontract Orders are placed in conjunction with MP Appendix 1 Sub Contract Order Notes and are deemed to take precedence" as meaning that the Order and Appendix 1 took precedence over other contractual documents. By paragraph 14 of the Referral Notice, the Quotation was expressly stated to include LGK's Terms. Several of those terms were then set out and relied upon by MPB including clause

2(a) (Contractor to carry out and complete the Works in accordance with the Quotation and in a good and workmanlike manner) and clause 8 (contractor to rectify defects notified within 12 months). Paragraphs 5.1 and 5.2 of the notice of intention to refer a dispute to adjudication were then repeated at paragraphs 2.1 and 2.2 of the Referral Notice under the heading "The Dispute Resolution Mechanism".

49. Paragraph 3.23.2 of the Referral Notice referred back to the first adjudication between the parties stating:

> "Mr Dight decided that "the Parties intended to [sic] that the terms and conditions of the Referring Party's quotation dated 11 April 2016 should stand as part of the Sub-contract save to the extent that they were varied by the express terms of the Respondent's Sub-contractor Order" (Decision, paragraph A6). MPB agrees with Mr Dight's decision that the terms of the Order and the Appendix took precedence over the other contractual documents and submits that this part of the Decision is binding on the parties."

50. Mr Riches issued his decision on 6 November 2017. Among other matters, he ordered LGK to pay MPB £76,056.67 (plus such VAT as is due in law) within 14 days of the decision.

51. Enforcement proceedings were then issued by MPB in this Court on 4 January 2018. MPB's Particulars of Claim (which bear the appropriate statement of truth) and the witness statement of Mr Twaites in support both referred to LGK's Terms as forming part of the Contract and to clause 11 as the relevant term of the Contract pursuant to which the dispute was referred to adjudication. Paragraph 4 of the Particulars of Claim reads:

> "The Sub-contract was evidenced in writing in the Claimant's Sub-contractor Order dated 13 April 2016 and the documents referred to in the Sub-contractor Order and annexed thereto. The documents included both Parties' terms and conditions and the Defendant's revised quotation dated 11 April 2016 ("the Quotation"). Copies of the Sub-contractor Order and the other contractual documents appear at Tab 1 to the Particulars of Claim".

Tab 1 included LGK's Terms. Paragraph 13 of the POC went on to state:

> "Either in accordance with the provisions of Clause 11 of the terms appended to the Defendant's Quotation (which is a contractual document) or under the terms implied into the Sub-contract by the Scheme for Construction Contracts, the Claimant applied to an adjudicator nominating body, adjudication.co.uk, which appointed Mr John Riches ("the Adjudicator") …"

The doctrine of approbation / reprobation

52. The doctrine of approbation and reprobation prevents a party from electing to take and pursue inconsistent stances. So, for instance, a party cannot simultaneously

approbate and reprobate the decision of an adjudicator. He cannot "blow hot and cold" about whether it is valid.

53. In *Codrington v Codrington* [1875] LR 7 HL 854 at 866, Lord Chelmsford referred to the doctrine in these terms:

> "He who accepts a benefit under an instrument must adopt the whole of it, confirming to all its provisions and renouncing every right inconsistent with it."

54. The doctrine was considered further in *Lissenden v CAV Bosh Limited* [1940] AC 412 in the House of Lords. In that case the appellant had obtained an award of compensation under the Workmen's Compensation Act 1925. He appealed the award on the basis that the compensation was insufficient whilst meanwhile accepting payment of the sum awarded to him. The House of Lords held that the doctrine did not apply to the circumstances of the case. Viscount Maugham explained that the doctrine, emanating from Scotland, was the same as the equitable doctrine of election and that election in equity was concerned with preventing a person from taking a benefit under an instrument such as a will whilst making a claim against it (see pages 417-419 of the judgment). Lord Atkin said this about the doctrine at 429:

> "But I also share the difficulty which I think all your Lordships feel as to the application of what has been called the doctrine of "approbation and reprobation." The noble Lord on the Woolsack has to my mind clearly shown the limitations of that doctrine as defined in the law of Scotland from which it comes. In this country I do not think it expresses any formal legal concept: I regard it as a descriptive phrase equivalent to "blowing hot and cold." I find great difficulty in placing such phrases in any legal category: though they may be applied correctly in defining what is meant by election whether at common law or in equity. In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other. Election between the liability of principal and agent is perhaps the most usual instance in common law.
>
> The doctrine of election could have no place in the present case. The applicant is not faced with alternative rights: it is the same right that he claims but in larger degree ..."

55. In *Banques des Marchands de Moscou v Kindersley* [1951] 1 Ch 112 the liquidator of the claimant bank brought an action against the partners of a firm to recover certain monies. The partners issued a summons for an order dismissing the action on the grounds that the bank was non-existent. Notwithstanding that, the partners had sought to prove in the bank's liquidation. The Court of Appeal held that there was no case of approbation and reprobation. Evershed MR said this:

> "The phrases "approbating and reprobating" or "blowing hot and blowing cold" are expressive and useful, but if they are used to signify a valid answer to a claim or allegation they must be defined. Otherwise the claim or allegation would be liable to be rejected on the mere ground that the conduct of the party making it was regarded by the court as unmeritorious. From the authorities cited to us it seems to me to be clear that these phrases 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. These requirements appear to me to be inherent, for example, in *Smith v. Baker* and *Ex parte Robertson*. See also the speech of Lord Atkin in *Evans v. Bartlam*: "I find nothing in the facts analogous to cases where a party, having obtained and enjoyed material benefit from a judgment, has been held precluded from attacking it while he still is in enjoyment of the benefit. I cannot bring myself to think that a judgment debtor, who asks for and receives a stay of execution, approbates the judgment so as to preclude him thereafter from seeking to set it aside, whether by appeal or otherwise. Nor do I find it possible to apply the doctrine of election": and the speech of Lord Russell of Killowen: "The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct; as where a man, having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit".

56. More recently, the doctrine has been expressed more generally and in broader terms. Notably, in *Express Newspapers Plc v News (UK) Ltd & others* [1990] 1 WLR 1320, a breach of copyright case concerned with mutual copying of news stories, the Court held that the claimant's resistance to judgment on the counterclaim was wholly inconsistent with its own claim and that on the basis of the doctrine of approbation and reprobation the claimant was not permitted to put forward two inconsistent cases. When giving judgment, Sir Nicolas Browne-Wilkinson VC put the doctrine in these terms:

> "The fact is that if the defences now being put forward by the defendants in relation to the "Daily Star" article are good defences to the Ogilvy case, they were and are equally good defences to the claim by the "Daily Express" against "Today" newspaper relating to the Bordes claim. I think that what Mr. Montgomery describes as what is sauce for the goose is sauce for the gander has a rather narrower legal manifestation. There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt

> one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.
>
> > To apply that general doctrine to the present case is, I accept, a novel extension. But, in my judgment, the principle is one of general application and if, as I think, justice so requires, there is no reason why it should not be applied in the present case."

57. Both parties also referred me to a number of cases in which the doctrine has been raised in the context of adjudication. In particular, I was referred to *PT Building Services Ltd v ROK Build Ltd* [2008] EWHC 3434 (TCC), Twintec Ltd v Volkerfitzpatrick Ltd [2014] EWHC 10 (TCC), *Rob Purton t/a Richwood Interiors v Kilker Projects Ltd* [2015] EWHC 2624 (TCC), *RMP Construction Services Ltd v Chalcroft Ltd* [2015] EWHC 3737 (TCC), and *Skymist Holdings Ltd v Grandlane Developments Ltd* [2018] EHC 3504 (TCC). Save in relation to the *PT Building Services* case to which I refer further below, I have not found these decisions particularly pertinent. That is because they are concerned with challenges to an adjudicator's jurisdiction on enforcement based, for instance, on whether the underlying construction contract was mis-described by the referring party or on whether the contractual provision relied upon to make the referral existed at all. This is not such a case.

58. All the same, certain principles arise from the case law taken as a whole:

    i) The first is that the approbating party must have elected, that is made his choice, clearly and unequivocally;

    ii) The second is that it is usual but not necessary for the electing party to have taken a benefit from his election such as where he has taken a benefit under an instrument such as a will;

    iii) Thirdly, the electing party's subsequent conduct must be inconsistent with his earlier election or approbation.

    In essence, the doctrine is about preventing inconsistent conduct and ensuring a just outcome.

The parties submissions

59. LGK's case is that having asserted that LGK's Terms were incorporated into the Contract and relied on clause 11 as the basis for the referral of the dispute to adjudication, it is no longer open to MPB to deny the validity of the arbitration agreement. MPB should not be permitted to approbate and reprobate the validity / incorporation of clause 11. LGK also submit that, in their Referral Notice in Adjudication no. 3, MPB expressly agreed with a finding made by Mr Dight, the Adjudicator in Adjudication no. 1, to the effect that the terms of the Order (including Appendix 1) took precedence over LGK's Terms and that this amounted to a final determination of any dispute as to the incorporation of LGK's Terms into the Contract and was and remains binding on the parties.

60. MPB submitted that to make good a case of approbation / reprobation, LGK needed to establish that MPB had unequivocally elected to incorporate LGK's Terms into the Contract and that their new course was inconsistent with that earlier approach. There was no unequivocal election in the present case because MPB had relied on clause 11 or section 108(5) of the Housing Grants, Construction and Regeneration Act 1996 to found the adjudicator's jurisdiction. MPB also submitted that usually it was necessary for a benefit to have been derived by the party relying on the doctrine from his opponent's original course of conduct and that no such benefit had been conferred on MPB in the present case because MPB had the right to refer the dispute to adjudication by virtue of the Construction Act in any event.

61. MPB also submitted, by reference to Sir Nicolas Browne-Wilkinson VC's judgment in the *Express Newspapers* case, that whether the doctrine went beyond the doctrine of common law or equitable election was unresolved in the authorities to date. In the adjudication context relevant case law established that taking a different position on the contract on enforcement will not amount to approbation / reprobation where the adjudicator had jurisdiction over the dispute in any event. The adjudicator's decision would remain enforceable. Further, none of the cases concerned approbation / reprobation of a dispute resolution clause and the Court should be very slow to extend the doctrine to a case such as this, all the more so in circumstances in which:

    i) Adjudication is by its nature a temporarily binding "rough and ready" form of dispute resolution;

    ii) Adjudication is very often conducted on one side or both in the absence of legal representation or advice;

    iii) The "rough and ready" nature of the adjudication process is ameliorated by the fact that its effects are only temporary and the parties can go to Court or arbitration for a final determination; and

    iv) The proposition that any party to an adjudication is to be treated as having elected unequivocally and for all time to commit to a particular position on the contract or anything else should be treated with utmost caution.

Discussion

62. I do not need to decide whether MPB have precluded themselves from arguing that LGK's Terms were not incorporated into the Contract. What I need to decide is whether, having relied on the dispute resolution provision at clause 11 of those terms, it is now open to MPB to deny that it is bound by the second limb of that mechanism, that is by the arbitration agreement.

63. In my judgment MPB clearly and unequivocally elected to rely on clause 11 of LGK's terms as setting out the dispute resolution provisions governing the parties' relationship. Both the notice of intention to refer a dispute to adjudication and the Referral Notice expressly relied on clause 11 as setting out the applicable dispute resolution provisions or to quote the Referral Notice itself "[t]he Dispute Resolution Mechanism". That was further confirmed to the Adjudicator and LGK by Systech's letter dated 26 September 2017 stating that "[t]he dispute resolution provisions are in Clause 11" and enclosing a copy of the relevant page of LGK's terms.

64. MPB submit that there was no unequivocal election because they relied on either clause 11 or section 108(5) of the Housing Grants, Construction and Regeneration Act 1996 to found the jurisdiction of the adjudicator. I do not think that is correct. In expressly and repeatedly relying and quoting clause 11 of LGK's terms in the adjudication and subsequent enforcement proceedings, MPB asserted the right both to refer the dispute to adjudication and to have the decision treated as binding on the parties until finally resolved by agreement or by arbitration under the CIMAR rules. Clause 11 envisages a two tier dispute resolution mechanism. The first tier consists of a referral of a dispute to adjudication and the second final determination of the dispute by arbitration. However, the two limbs of clause 11 go hand in hand since the second limb of clause 11 specifies the extent of the binding nature of the decision the subject of the first tier of the dispute resolution mechanism.

65. MPB also submitted that there was no election because they were bound by the findings of Mr Dight in the first adjudication to the effect that LGK's Terms formed part of the Contract. I don't accept that submission. It was based primarily on the fact that in the first adjudication the adjudicator awarded LGK interest on the basis of a clause in the LGK Terms. That does not in my judgment explain the repeated and express reliance on the part of MPB in Adjudication no. 3 on clause 11 of the LGK Terms and there is no suggestion that MPB had any regard to Mr Dight's findings when making the averments now relied upon by LGK as approbating the incorporation of the LGK Terms into the Contract. Indeed, whilst not binding and for reasons that are not clear, Mr Dight rejected clause 11 as founding his jurisdiction in Adjudication no. 1. MPB had a choice and they chose to invoke the dispute resolution mechanism set out in clause 11.

66. LGK did not take issue with MPB's case that the dispute was governed by the dispute resolution mechanism set out in clause 11 and (until MPB raised its jurisdiction challenge in the arbitration proceedings) the parties proceeded according to those dispute resolution provisions.

67. By challenging the arbitration agreement, MPB are now asserting a different and inconsistent right that is to have the adjudicator's decision treated as binding on the parties until finally resolved by agreement or in the Courts, that is in a different forum and under different procedural rules.

68. Although, as rightly submitted by Mr Chennells, the doctrine of equitable election usually requires the election to have conferred a benefit on the party electing that is not invariably the case. As can be seen from the passage from his judgment in *Banque des Marchands de Moscou v Kindersley* [1951] 1 Ch 112, Evershed MR left the position open when holding that a party would not be taken to have made an election from which he could not resile unless he had taken a benefit from that course of conduct "at least in a case such as the present". In *PT Building Services Ltd v ROK Build Limited* [2008] EWHC 3434 (TCC), the claimant relied in part on the fact that ROK had paid the adjudicator's fees to submit that ROK had thereby elected to treat the decision as valid. ROK submitted that it was difficult to see how the payment could be characterised as ROK taking a benefit. However, Ramsey J held that "the taking of a benefit, whilst sufficient for there to be an election, is not necessary" and that what had to be determined was whether there had been an election (at [29]). He went on to hold that by making the payment ROK had elected to treat the adjudicator's decision on fees and expenses as being a valid decision meaning that

ROK could no longer challenge that decision. It is therefore clear that taking a benefit is not an invariable requirement of the doctrine.

69. MPB submit that their reliance in the present case on clause 11 of LGK's Terms did not confer a benefit upon them since they could just as easily have relied solely on section 108(5) of the Housing Grants, Construction and Regeneration Act 1996 to refer the dispute to adjudication. I think there is force in that submission although reliance on clause 11 will have reinforced MPB's reliance on section 108(5) of the Act. Reliance on clause 11 also went beyond reliance on the first limb of the clause and provided certainty between the parties as to the future shape the dispute resolution process should take. Be that as it may, obtaining a benefit from the election is not necessary. What is key is that there should have been an election. In choosing to rely on clause 11 as the applicable dispute resolution mechanism for the purposes of the adjudication, MPB could not later challenge the second tier of that provision.

70. Further, the requirement for a benefit to have been conferred on the party electing makes sense in the context of election and estoppel. It explains why it would be unjust to allow a party to reprobate. However, a detriment suffered by the other party will also explain why it would be unjust to allow the first party to reprobate. Here the parties were in agreement as to the applicable dispute resolution mechanism. According to that mechanism the adjudicator's decision was to be binding until the dispute was finally resolved through agreement or arbitration. Not surprisingly, having lost the enforcement proceedings and in accordance with MPB's approach, LGK therefore served a notice of arbitration on MPB. If LGK were now permitted to reprobate its previous case that the dispute resolution mechanism was as set out in clause 11 LGK will have both wasted time and costs in seeking to have the dispute finally resolved by arbitration. In those circumstances, in my judgment it would be unjust to allow MPB to approbate and then reprobate the dispute resolution mechanism set out in clause 11 of LGK's Terms.

71. Accordingly, I consider that the facts of the present case fall within the confines of the equitable doctrine of election without having to consider the wider general statement of principle set out by Sir Nicholas Browne-Wilkinson VC in the *Express Newspapers Plc* case. However, were it necessary, I would have held that the general principle enunciated by Sir Nicholas Browne-Wilkinson should extend to the present case and that justice or fairness requires that having elected to adopt the dispute resolution mechanism set out in clause 11 of LGK's Terms, MPB should be held to it.

72. MPB submitted that the Court should be slow to find that the doctrine of approbation / reprobation should apply in relation to things said and done in the context of an adjudication where by its nature adjudication is only a temporarily binding, "rough and ready" form of dispute resolution, very often conducted by the parties in the absence of legal representation and no more than a precursor to court or arbitration proceedings in which the parties may set out their cases in full. The point was also made on behalf of MPB that if things said and done in adjudication proceedings are to be treated as unequivocal elections binding how a party may put its case for all time that would encourage parties to crawl all over what had been said and done in those proceedings in the hope of preventing the other party from developing its case in subsequent proceedings. I have considerable sympathy with those submissions. It seems to me that a party's case may change over time, that amendments may be made and even admissions withdrawn in certain circumstances. However, this case is not

about whether MPB should be bound by how they put their case in the adjudication. Here the approbation and reprobation concern a party's election to use a particular dispute resolution procedure and goes beyond how MPB put their case in the adjudication.

73. Finally I need not address LGK's case based on paragraph 3.23.2 of the Referral Notice to the effect that MPB are bound by their agreement that the terms of the Order and Appendix 1 should take precedence over the other contractual documents. I do not think this adds anything to the fact that MPB elected to adhere to the dispute resolution mechanism set out in clause 11 of LGK's terms for the reasons already stated.

74. Accordingly, MPB's application to set aside the Award is dismissed with costs. I will deal with any consequential issues, if necessary, on paper.