

## Construction Law Update

### ‘Blowing Hot and Cold’: Adjudicators’ Jurisdiction and the Principle of Approbation and Reprobation

If the wrong route to the appointment of an adjudicator has been taken, the adjudicator will not have jurisdiction. However, a party cannot approbate and reprobate, or ‘blow hot and cold’, in relation to the validity of an adjudicator’s decision. For example, a party cannot assert that an adjudicator’s decision is valid and at the same time challenge the validity of the decision. Both of these issues were considered in the recent TCC case of *Skymist Holdings Limited (“Skymist”) v Grandlane Developments Limited (“Grandlane”)*.

#### Background

Skymist engaged Grandlane to provide development and project management services in relation to a property in Hampshire. Skymist then terminated the appointment and Grandlane claimed it was owed substantial sums.

The Chartered Institute of Arbitrators (“**CI Arb**”) was identified as the adjudicator nominating body (“**ANB**”) in a draft deed of appointment (the “**DOA**”). Grandlane issued a Notice of Adjudication to Skymist and, pursuant to paragraph 2 (1) (b) of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the “**Scheme**”), requested the CI Arb to nominate an adjudicator. The request led to the nomination of an adjudicator by the CI Arb.

Skymist challenged the appointment on the basis that the DOA had not been agreed and the adjudicator’s appointment was a nullity. Grandlane therefore withdrew the adjudication and issued a new notice of adjudication. This time Grandlane wrote to the RICS, requesting it to nominate an adjudicator, pursuant to paragraph 2 (1) (c) of the Scheme on the basis that no nominating body was identified in the contract.

#### The Adjudicator’s Decision

Skymist argued that the second adjudicator had decided that the DOA was the contract between the

parties. Therefore, his appointment should have been made by the CI Arb and not the RICS. The Court held that, although both parties relied on various parts of the DOA, the adjudicator had not found that the DOA was the contract, or that the contract included the clause identifying the CI Arb as the ANB. Accordingly, his nomination through the RICS was correct and he had jurisdiction to decide the dispute.

#### Approbation and Reprobation (“Blowing Hot and Cold”)

Skymist contended that Grandlane approbated and reprobated the DOA on the basis that Grandlane relied upon it in its submissions to the second adjudicator but also accepted that it didn’t apply when seeking a nomination from the RICS.

The Court considered Skymist’s argument and summarised approbation and reprobation as a species of estoppel, the principles being:

1. The approbating act or conduct in question needs to be clearly defined and unequivocal;
2. The party in question must gain a benefit from the approbation; and
3. The reprobating act must be clearly inconsistent with the earlier approbation and itself be clear and unequivocal.

The Court held that Grandlane had not suggested, let alone clearly suggested, that its case was based either upon the DOA being the contract or upon a contract which included the clause identifying the CI Arb as the ANB. Accordingly, Grandlane had not approbated the DOA and there was no reprobation in seeking a nomination from the RICS. There was therefore no inconsistency and it was held that Grandlane had not benefitted in any event.

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Further, the Court observed that the irony of this case was that, if approbation and reprobation had occurred at all, it could be found in the actions of Skymist. Skymist had approbated and reprobed by first contending that Grandlane could not rely upon the clause in the DOA in seeking a nomination but then contending that Grandlane could not seek a nomination under paragraph 2(1)(c) of the Scheme because it should have been sought under the DOA. The Court concluded:

*“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.”*

No approbation and reprobation was found on the part of Grandlane and Skymist’s claim was dismissed.

### Analysis

This case highlights the potential difficulties in appointing an adjudicator where there is a dispute as to the correct procedure. It is important that the manner by which an adjudicator is appointed is correct as a failure to do so may result in the adjudicator lacking jurisdiction. However, this decision also makes clear that *“highly technical (but legally unmeritous) arguments”* will not be entertained by the Court. Whilst a party is of course entitled to challenge the jurisdiction of the adjudicator in certain circumstances, the party doing so must have clear grounds.

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