Kluwer Arbitration Blog

Eating Your Cake and Having It Too: The Equitable Doctrine of Approbation and Reprobation in MPB v LGK

Anna Maxwell (Enyo Law LLP) · Wednesday, May 27th, 2020

The proverb "You can't have your cake and eat it too" makes more sense to some people in the reverse, and it was in fact first formulated in that way in English in the 16th Century. Its point, as we are all aware, is that sometimes we have to make a choice between two options that cannot be reconciled. Legally, it is discussed in the context of the equitable doctrine of election, or approbation and reprobation.

On 23 January 2020 Veronique Buehrlen QC, sitting as Deputy High Court Judge, handed down judgment in MPB v LGK [2020] EWHC 90 (TCC), dismissing an application by MPB to set aside an arbitration award on jurisdiction pursuant to section 67 of the Arbitration Act 1996 (**the Act**). In doing so, she found that an arbitration agreement included in a lower ranking set of standard terms and conditions bound the parties in the absence of any dispute resolution clauses in contractual documents which ranked higher in the contractual hierarchy. Although the Judge made her decision based on the question of whether LGK's terms and conditions had been incorporated into the contract between the parties, given the facts and submissions made by the parties, her judgment necessarily analysed the doctrine of approbation and reprobation and recent authorities pertinent to the dispute.

Facts of the Case

MPB is a building contractor, which had entered into an agreement with LGK, a steel supplier and installer, to supply and install structural steel to MPB's project in North London. The agreement itself arose out of an exchange of a number of emails which attached various quotations, amendments to those quotations and each party's standard terms and conditions. One of the emails contained a quotation (**the Quotation**), that was accompanied by LGK's standard terms and conditions (**LGK's Terms**). The final order, as agreed between the parties, incorporated MPB's standard terms (**MPB's Terms**) and included a table of works which was based on the Quotation.

Clause 11 of LGK's Terms contained a two-tiered dispute resolution clause, which provided:

> *either party may refer a dispute to adjudication at any time…The Decision of the Adjudicator shall be binding on the parties until the dispute is finally resolved*

> *through agreement for by Arbitration* [sic] *under the CIMAR rules.*

A dispute arose between the parties regarding the works performed by LGK, and MPB engaged other contractors to complete LGK's works. A series of four adjudications followed, two initiated by each party. The third was commenced by MPB in reliance on LGK's Terms, pursuant to which MPB was awarded £76,056.67 and successful enforcement proceedings followed. Subsequently, LGK commenced arbitration proceedings in relation to the adjudication decision, in accordance with Clause 11 of the LGK Terms. Mr Jonathan Cope was appointed as sole arbitrator and immediately faced a jurisdictional challenge from MPB. When he issued his award on jurisdiction, holding that he did have jurisdiction over the dispute by virtue of the arbitration agreement in LGK's Terms, MPB filed an application to the High Court under section 67 seeking to set aside his award.

Decision of the High Court

MPB's application to the High Court sought to set aside the arbitrator's award on jurisdiction pursuant to section 67(1)(a) and section 67(3)(c) of the Act on the basis that there was no arbitration agreement between the parties and the Tribunal accordingly lacked substantive jurisdiction over the dispute. MPB argued that the agreement with LGK did not incorporate the LGK Terms, in particular, Clause 11. It did so notwithstanding its own reliance on Clause 11 in initiating the third adjudication. At the outset of her judgment, Veronique Buehrlen QC noted that it was common ground that a challenge under section 67 proceeds *de novo*, that is, that Mr Cope's award on jurisdiction had no legal or evidential weight.

Veronique Buehrlen QC was asked to rule on two questions:

- Did the agreement between MPB and LGK incorporate Clause 11 of LGK's Terms?
- In light of MPB's conduct in the third adjudication, was it open to MPB to challenge the application of Clause 11?

Incorporation of LGK's Terms

On the first issue, the Judge found that the agreement did indeed incorporate Clause 11 of LGK's Terms, giving three reasons. Firstly, MPB had had clear notice of LGK's Terms, as the Quotation had been provided to it with LGK's Terms. Secondly, the scope of work and price contained in the Quotation were *"clearly based on, and to be read in conjunction with"* LGK's Terms. Finally, despite MPB's Terms being given priority, the arbitration agreement in LGK's Terms was not inconsistent with MPB's Terms, which did not contain a dispute resolution clause. She found that:

> [w]*hilst the obvious implication where a contract is silent on the matter of dispute resolution is that any dispute will be brought before the Courts …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.*

Approbation and Reprobation

As noted above, the Judge made clear that in light of her finding on the first issue, she did not need to consider LGK's alternative argument on approbation and reprobation. She nevertheless did so in the event that it provided an alternative route to establishing jurisdiction were she to be mistaken as regards her conclusions on incorporation of LGK's Terms.

The Judge held that MPB had unequivocally elected to rely on Clause 11 and its assertion of a right to challenge the arbitration agreement was different to and inconsistent with that election. She found that the question was not whether MPB should be precluded from arguing their case in a particular way, but about their clear and unequivocal election to use a particular dispute resolution procedure.

The Judge summarised the principles arising from the case law as follows (¶58 of the judgment):

> *(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 Judge dismissed MPB's application to set aside the award with costs.

Comment

The case provides a clear reminder to parties to ensure consistency or a clear hierarchy in dispute resolution provisions where multiple contracts and/or standard terms are in play and to ensure that dispute resolution provisions are included in all contracts. This is of course particularly pertinent in the construction industry. It also further emphasises the potential finality of jurisdictional decisions that may be taken early and if parties seek to rely on one tier of a dispute resolution clause, they are likely later to be precluded from challenging the validity of the second tier.

Perhaps of most interest however is the analysis applied by the Judge to the question of whether the electing party needs to have taken a benefit for the doctrine of approbation and reprobation to become engaged. MPB had argued that there was such a need for a benefit and no benefit had been conferred in this case, because MPB had the right to refer the dispute to adjudication by virtue of the Construction Act in any event. The potential need for a benefit to the party making the election was enunciated by Lord Evershed MR in *Banque des Marchands de Moscau (Koupetschesky) v*

Kindersley [1951] 1 Ch 112, who described the doctrine as preventing a party from resiling from its election where the party 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.*

Further, in *Skymist Holdings Ltd v Grandlane Developments Ltd* [2018] EWHC 3504, Waksman J set out principles applying to the doctrine and said that the party must gain a benefit, because: '*if there was no benefit, it was not clear why it would be unjust to the other party to allow the first party later to "reprobate.""*

Veronique Buehrlen QC however took the view that it was "*usual but not necessary"* for an electing party to have taken a benefit. She rejected the relevance of certain of the adjudication authorities on the doctrine (including *Skymist*) on the basis that they related to challenges to an adjudicator's decision on enforcement. She noted at ¶68 that Lord Evershed MR had in fact left the position open, by requiring the conferment of a benefit "*at least in a case such as the present."* Ramsey J in *PT Building Services Ltd v ROK Build Limited* [2008] EWHC 3434 (TCC) had however found that "*the taking of a benefit, whilst sufficient for there to be an election, is not necessary"* and that instead what had to be determined was whether there had been an election. A detriment suffered by the other party would also explain why it would be unjust to allow a party to reprobate. Here, the fact of LGK's wasted time and costs would amount to such a detriment were MPB to be permitted to reprobate its previous position.

The approach taken by the Judge clearly achieved an outcome that is fair on the facts: MPB could not eat its cake and have it, too.

Postscript: Does the order matter? Not if "and" works to suggest that the two activities cannot occur simultaneously…otherwise and for the purposes of the doctrine of election, the only version that makes sense is the original.

This entry was posted on Wednesday, May 27th, 2020 at 9:00 am and is filed under Approbation and Reprobation, Arbitration Act 1996, England
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.