Neutral Citation Number: [2019] EWHC 747 (TCC)

Case No: HT-2019-000005

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2019

Before :

MRS JUSTICE JEFFORD DBE

- -

Between :

GRANDLANE DEVELOPMENTS LIMITED	**Claimant**
- and –	
SKYMIST HOLDINGS LIMITED	**Defendant**

- -
- -

Jonathan Selby QC (instructed by **Goodman Derrick LLP**) for the Claimant
Duncan Matthews QC and Rupert Choat (instructed by **Stephenson Harwood**) for the Defendant

Hearing date: 6 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE JEFFORD

Mrs Justice Jefford:

1. This is an application by Grandlane Developments Limited ("Grandlane") for summary judgment to enforce the decision of the adjudicator, John Riches, given on 12 November 2018. He decided that Skymist Holdings Limited ("Skymist") should pay to Grandlane the sum of £963,821.25 plus VAT and interest.

Background

2. The background to this matter is uncontroversial although little else is. Some of it is already set out in the judgment of Waksman J in Skymist Holdings Limited v Grandlane Developments Limited [2018] EWHC 3504 (TCC) to which I will refer.

3. Skymist is a company incorporated in the British Virgin Islands. It is legally and beneficially owned by Mrs Elena Baturina. In 2013, Skymist purchased Beaurepaire Park, an extensive country property in Hampshire, which was to be developed and to become Mrs Baturina's family home.

4. Mrs Baturina engaged Grandlane to provide development management services in connection with that development. From about May 2016, Grandlane's engagement was transferred from Mrs Baturina to Skymist.

5. Mrs Baturina describes Mr Olgert Deinis of Grandlane as her trusted agent with whom she had a relationship of trust and confidence. It does not appear to be in issue that Mr Deinis originally incorporated Grandlane in 2013 for the purpose primarily of managing this development and that, until about 2015, Grandlane was beneficially owned by Mrs Baturina. The company is now solely owned by Mr Deinis.

6. The precise terms of the contract between Skymist and Grandlane have been controversial but it is agreed that a document called the "Development Management Agreement – Beaurepaire General Terms and Conditions" evidences the key terms of the contract. These included the following provision:

> "**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 GL at the expense of the Customer on a monthly basis …."

7. One of the consultants engaged by Grandlane was the architects for the project, PTP.

8. By letter dated 27 October 2017 Skymist terminated Grandlane's engagement. The letter set out Skymist's dissatisfaction with Grandlane's performance and claimed that Skymist was entitled to terminate for breach or for convenience. Under the heading "Next steps", the letter stated: "For the avoidance of doubt no further sums shall become due to Grandlane in respect of the Development Management Fee and/or your Sub-consultants' Fees."

9. Thereafter, Grandlane made claims for its fees and those of consultants which Skymist disputed. Those claims were set out in a pre-action protocol letter from its then solicitors, Joseph James Law ("JJL"), dated 27 November 2017. The letter stated that the sum currently owed to Grandlane by Skymist was £280,323 plus VAT but also alleged that Skymist's termination was in breach of contract and said that Grandlane would claim damages accordingly. No quantification of that claim for damages was set out but JJL said that, if matters could not be resolved, Grandlane would seek a declaration that it was entitled to payment of 5% of the total construction cost of the project. Grandlane also claimed the sum of £194,588.57 plus VAT in respect of "the unpaid fees of professional specialists employed on the Beaurepaire Park project for period August 2017 - October 2017". The letter was accompanied by a series of invoices relating to that claim including 3 invoices from PTP to the end of September 2017 which totalled £144,120 plus VAT.

10. On 18 July 2018, and in the circumstances that I refer to below, PTP invoiced Grandlane in respect of its fees. The total outstanding on the face of the invoice was £1,120,890 plus VAT. On 19 July 2018, Grandlane sent to Skymist two invoices ostensibly dated 28 October 2017 (the day after termination): one was in respect of Grandlane's fees in the sum of £570.413.00 plus VAT and the other in respect of consultants' fees in the sum of £1,061,341 plus VAT. The latter invoice expressly referred to "Claim of Unpaid fees 18.07.2018". It is not clear to me why a lesser sum was claimed for PTP's fees but nothing turns on it.

11. In August 2018, Grandlane commenced an adjudication against Skymist. An adjudicator, Mr Silver, was appointed by the CIArb. Skymist took issue with his appointment on the grounds that the clause that provided for the CIArb to be the nominating body was to be found in a document referred to as the Draft Deed of Appointment ("the DOA") which Skymist argued was not incorporated into the contract with Grandlane. In light of that objection, the adjudication was not pursued. Instead, Grandlane commenced a second adjudication by notice dated 31 August 2018 and sought appointment of an adjudicator from the RICS as a nominating body. Mr Riches was appointed by the RICS.

12. Skymist again took issue with that appointment and issued Part 8 proceedings on 27 September 2018, during the currency of the adjudication. Those proceedings came before Waksman J in December 2018 (after the adjudicator had given his decision) and his judgment sets out more fully the background facts and Skymist's arguments. In short, as he sets out at paragraph 12 of his judgment, Skymist contended that if the contract incorporated the DOA, as Mr Riches had by that time found it did, the appointing body was the CIArb and Mr Riches was not properly appointed. Alternatively, Skymist argued that Grandlane had approbated and reprobated: it had approbated the DOA for the purposes of submissions to Mr Riches but had reprobated the adjudication provision in applying to the RICS for an appointment. As Waksman J observed at paragraph 76 *"The irony of this case is that if there is any A/R [approbation and reprobation] here, it is in my view to be found in the actions of Skymist."* He decided that Mr Riches was properly appointed. Skymist wished to appeal. Both Waksman J and the Court of Appeal refused permission to appeal. No jurisdictional issue therefore now arises.

Claims in the adjudication

13. In the adjudication Grandlane claimed not only their own fees but sums that they had paid or were liable to pay to other consultants in a total of £1,417,729 (including VAT). The largest sum, being £1,265,010.86, was claimed in respect of PTP's fees.

14. In his decision, the adjudicator recorded that Grandlane's case was that it was entitled to the following remuneration:
    (i) a fee of 5% of the construction costs for the provision of development management services;
    (ii) a fee of 0.5% of the estimated value of the property, being around £40 million, for planning consent;
    (iii) an indemnity against all consultants' fees.
    Mr Riches recorded that in broad terms Skymist accepted that Grandlane was entitled to that remuneration but that there were particular issues of interpretation.

15. Under (i), Grandlane claimed a sum of £620k (based on a construction cost at the date of termination of £12.4 million), less amounts paid, leaving a balance of £379,413. That sum was agreed. Under (ii), Grandlane claimed a further £220k. The issue between the parties turned on whether Grandlane was entitled to a percentage of the construction cost or the greater total development cost. Mr Riches decided that the fee was to be based on the total construction cost, so that Grandlane's recovery was only £62,000.

16. In respect of the consultants' fees, the decision records that there was a dispute as to whether any obligation of Skymist was conditional on Grandlane having first paid the consultants. At paragraph 124.00 of his decision, the adjudicator noted that Skymist went further and said that it disagreed that Grandlane was entitled to an indemnity as opposed to an ordinary contractual right to payment. He concluded that Grandlane was entitled to be paid consultants' fees for which it was liable to the consultants and that payment was not a pre-condition.

The claim for consultants' fees

17. As I have said, the largest claim in respect of consultants' fees was that of the architects, PTP. PTP had been appointed by an agreement dated 5 November 2013. The Memorandum of Agreement recorded that it was entered into by Grandlane Developments Ltd. and PTP Architects London Limited. It incorporated the RIBA Standard Conditions for Appointment for an Architect (2012 revision). Those conditions made provision for adjudication and for the final form of dispute resolution to be arbitration.

18. The Basic Fee for new build works was 7% of the Construction Cost. Construction Cost is defined in the Conditions as:

> "- the client's initial budget for constructing the Project as specified in the Project Data or where no such amount is specified a fair and reasonable amount; or subsequently
>
> - the latest professionally prepared estimate approved by the Client; or where applicable
>
> - the actual cost of constructing the Project upon agreement or determination of a final account for the Project …"

19. It does not appear to have been an issue that featured in the adjudication, but it was common ground before me that, as between PTP and Grandlane, Grandlane had contracted as a principal but that, as between Skymist and Grandlane, Grandlane had acted as Skymist's agent in so doing.

20. Following the termination of Grandlane's engagement by Skymist, PTP's appointment was also terminated. I shall refer to this further below although nothing turns on exactly what happened. PTP later provided some ad hoc or limited services directly to Skymist. PTP submitted no further invoices to Grandlane until its invoice dated 18 July 2018.

21. In accordance with its terms of appointment, PTP's fees claim was calculated as a percentage of construction cost. One of the issues in the adjudication was Skymist's case that the figure used for these costs was overstated. The relevant figure of £34,764,863.11 came from Leslie Clarke who were the quantity surveyors on the project. Skymist had sought expert evidence from Mr Mark Pontin on an alternative cost or value. The adjudicator's view was that Mr Pontin had not carried out an independent valuation of the works at all. Rather, he had adopted what he was instructed was an agreed construction cost of £23.5 million. He had not sought to verify that figure; he had at best made some minor adjustments to it; and he had not carried out any analysis of the Leslie Clark figure. The adjudicator concluded that the Leslie Clark estimate based on their first-hand knowledge of the project was more compelling.

22. There were also disputes as to the extent of work completed by PTP on which the adjudicator preferred the evidence of PTP.

23. Mr Riches concluded that the total PTP claim was £2,068,275.72 (including expenses) less sums paid of just over £1 million and that the balance due was £1,053, 275.72.

24. The adjudicator further allowed fees for other consultants; one claim was not pursued; and he rejected two claims in respect of parties he did not consider were consultants.

The end result in the adjudication

25. There was a further dispute between the parties as to what Grandlane had been paid and for what (in particular whether sums paid were referable to some other arrangement or project). Grandlane said it had only been paid £249,587. Skymist relied on a figure of £1,094,676.57. The adjudicator decided that that greater sum had been paid and that £831,954.27 of that amount was referable to the Beaurepaire project. Grandlane was, therefore, not entitled to any further payment for its own fees on this project and, indeed, had been overpaid.

26. Skymist also claimed a credit of £212k saying that it had paid more than the sum stated in Grandlane's letter of claim dated 18 July 2018. The adjudicator found that the records did not live up to the claim made by Skymist and did not address the claims in the adjudication. He did not allow the credit. Skymist further made claims for damages including the additional cost of completing Grandlane's work (in the sum of £1,876,126.70) which also failed.

27. The calculation of the end result, as I have called it, was set out in paragraph 301 of Mr Riches' decision and gave the sum due to Grandlane of £928,296.45.

Skymist's suspicions

28. Mr Riches observed in the course of his decision that the parties had been relentless in ensuring that they both had every opportunity to say everything they wished to say. Mr Riches is a highly experienced adjudicator and well-placed to make such an observation and it gives the flavour of a hard fought adjudication.

29. One issue that was not raised before the adjudicator, however, was Skymist's suspicions that Grandlane's claim, or at least that part of it that passed on PTP's fees, was fraudulent. That issue was not raised despite the fact that, on the Defendants' evidence in the statements of Mrs Baturina and Mr Bercow (in the proceedings in the Commercial Court which followed), at the time the adjudication was underway, Mrs Baturina had come to suspect some fraudulent collusion between Grandlane and PTP which had led to the inflation of PTP's fees.

30. In her statement dated 21 December 2018, Mrs Baturina referred to the letter dated 27 November 2017 from JJL which claimed, amongst other things, a balance due to PTP of £144,120. She said that the increase in the claim aroused her suspicions, along with (i) the fact that the claim letter was sent on 19 July 2018, just after the invoice from PTP was received and (ii) the refusal to disclose in the adjudication any of Grandlane's correspondence with PTP before the presentation of the invoice. She continued:

> "The only inference I can draw is that Grandlane and PTP were colluding to increase artificially the value of PTP's claim to the disadvantage of myself and Skymist and, it appears, had something to hide in the course of the adjudication."

31. It is evident from that statement that Mrs Baturina's suspicions were held at the time of adjudication. Because of those suspicions, in September 2018, Skymist's solicitors, Stephenson Harwood, requested disclosure of correspondence between Grandlane and PTP preceding the sending of PTP's invoice. Grandlane, through its solicitors, declined to provide disclosure, which appears to have fuelled Mrs Baturina's suspicions. Indeed, by letter to PTP dated 25 September 2018, Stephenson Harwood set out Skymist's suspicions as to fraudulent collusion between Grandlane and PTP and requested disclosure from PTP. PTP also declined to give disclosure and rejected any allegation of collusion, in the sense of "nefarious dealings". Nonetheless the issues were not raised with the adjudicator at all.

32. Following the adjudication, however, Skymist persisted and threatened to make an application for pre-action disclosure. As a result, some voluntary disclosure was made on 12 December 2018. Skymist was dissatisfied with that and, on 21 December 2018, issued its application, in the Commercial Court, for pre-action disclosure.

33. In support of that application, Mrs Baturina said that that the voluntary disclosure vindicated her suspicions and that it seemed to her clear that Mr Deinis had actively encouraged and colluded with Mr Patel of PTP to make its claim against Skymist, with a

view to PTP recovering an excessive sum, and had done so because any sum recovered from Skymist would be shared between Mr Deinis and PTP. She could see no other reason why Grandlane would assist PTP in bringing its claim.

The application for pre-action disclosure

34. As I said, Skymist's application in the Commercial Court for pre-action disclosure was supported by the statements of Mrs Baturina and Mr Bercow of her/Skymist's solicitors. The application itself is not before me but, as I understand it, it was made on the basis that Skymist anticipated that it would commence proceedings against Grandlane on a number of potential bases including fraud and breach of fiduciary duty. In Skymist's skeleton argument on the application before me, the potential claims were referred to as a claim for breach of fiduciary duty and/or good faith ("the fiduciary claim"); a claim for conspiracy to injure Skymist ("the conspiracy claim); and a claim for declaratory relief in respect of the true quantum of Grandlane's entitlement and a final determination of whether the adjudicator's decision was enforceable. It was, therefore, not in issue that those proceedings would extend beyond any issues that might arise on this adjudication enforcement.

35. Following a hearing on 22 February 2019, Teare J made an order for pre-action disclosure which was provided on 27 February 2019. What was disclosed filled (or more accurately overfilled) 5 lever arch files, all the contents of which were before me on this application. There is, however, a very significant degree of repetition in these documents as they mostly consist of e-mail chains where the preceding lengthy chain is always printed along with the most recent e-mail.

36. Following that disclosure, and as set out more fully below, Skymist's position at the hearing before me was that the documents demonstrated that Grandlane was colluding closely with PTP in the presentation of claims in the adjudication against Skymist and that that collusion had a financial element because Grandlane and PTP had agreed to share (in some way) Goodman Derrick's fees in the adjudication, Mr Silver's fees and Mr Riches' fees. Although it was not at the forefront of the oral submissions of Mr Matthews QC on behalf of Skymist, the skeleton argument still maintained that the most likely inference was that Grandlane and PTP had also agreed to share any sum awarded by the adjudicator in respect of PTP's claim "which would fundamentally impact upon Grandlane's entitlement to claim those sums from Skymist in the adjudication (effectively amounting to a secret commission or profit undisclosed by Grandlane to the adjudicator)".

37. In addition, Skymist raised a number of further points about the extent of the disclosure given and, in particular, about documents over which privilege was, on its case, wrongly asserted. A further application, under the liberty to apply, had been made by the time of the hearing before me but no date for that hearing had yet been fixed.

Skymist's position

38. Skymist's first argument was that the adjudicator's decision should not be enforced because it was tainted by fraud. In the alternative, Skymist submitted that this application ought to be adjourned at least until after the further application for pre-action disclosure

and the consideration of any further disclosure. Even leaving aside that that was advanced as an alternative position, it seemed to me impossible to determine that application without further consideration of Skymist's case and the potential relevance of further disclosure. I, therefore, asked counsel to address me on all issues and reserved the decision on an adjournment. Skymist submitted lastly that, if summary judgment was granted, there should be a stay of execution.

Fraud: the law

39. So far as the allegation of fraud is concerned, the principles relating to allegations of fraud raised in the context of an adjudication enforcement are set out in *SG South v King's Head Cirencester LLP* [2010] BLR 47, a decision of Akenhead J. At paragraph 20, he said:

> "(a) Fraud or deceit can be raised as a defence in adjudications provided that it is a real defence to whatever the claims are; obviously, it is open to parties in adjudication to argue that the other party's witnesses are not credible by reason of fraudulent or dishonest behaviour.
>
> (b) If fraud is to be raised in an effort to avoid enforcement or to support an application to stay execution of the enforcement judgement, it must be supported by clear and unambiguous evidence and argument.
>
> (c) A distinction has to be made between fraudulent behaviour, acts or omissions which were or could have been raised as a defence in the adjudication and such behaviour, acts or omissions which neither were nor could reasonably have been raised but which emerge afterwards. In the former case, if the behaviour, acts or omissions are in effect adjudicated upon, the decision without more is enforceable. In the latter case, it is possible that it can be raised but generally not in the former.
>
> (d) Addressing this latter case, one needs to differentiate between fraud which directly impacts on the subject matter of the decision and that which is independent of it…Whilst matters in the first category can be raised, generally those in the second category should not be. The logic of this is that it is the policy of the 1996 Act that decisions are to be enforced but the Court should not permit the enforcement directly or at least indirectly of fraudulent claims or fraudulently induced claims; put another way, enforcement should not be used to facilitate fraud; fraud which does not impact on the claim made upon which the decision was based should not generally be deployed to prevent enforcement."

40. As Mr Selby QC, for Grandlane, reminded me fraud in this context means fraud in the classic sense in which it is used in *Derry v Peek* (1889) 14 App. Cas. 337 , namely that a false representation has been made that the maker of a statement knows it to be untrue or does not believe it to be true or where he is reckless as to its truth, careless as to whether it is true or not.

41. In this case, Grandlane relies on both sub-paragraphs (b) and (c) of the principles in *SG South*. Mr Selby QC submits that there is no clear and unambiguous evidence of fraud and that, in any event, the arguments could have been but were not raised in the adjudication (in which, as I have said, the adjudicator considered that no stone had been left unturned).

42. Mr Matthews QC, however, contends that there is clear and unambiguous evidence of fraud. As I have said, it is common ground that in entering into the contract with PTP, Grandlane acted in respect of Skymist, as Skymist's agent, Grandlane, therefore, owed to Skymist the duties of an agent and, on Skymist's case, further fiduciary duties arising from the relationship of trust and confidence between Mr Deinis and Mrs Baturina. Against this background, Mr Matthews QC puts the case in a number of ways.

    (i) He submits that it is clear from the disclosure now provided that Grandlane was working with PTP, putting it at its lowest, to present and advance PTP's fees claim to Skymist. That, he says, was in breach of Grandlane's duties as an agent which were to protect the position of Skymist and advance Skymist's interests rather than PTP's.
    (ii) He submits that there is clear evidence of fraud because Grandlane kept secret a financial benefit which they would receive for pursuing the claim in the form of the payment of some or all of Goodman Derrick's costs and the adjudicators' fees. The true extent of that agreement has still not been disclosed.
    (iii) Further he submits that the claims advanced by Grandlane in the adjudication were necessarily fraudulent because Grandlane was only entitled to be indemnified against its liability to PTP. Since PTP was to defray at least some of the costs or expenses incurred by Grandlane in the adjudication, Grandlane's liability to PTP was reduced by a corresponding amount, so that a claim for the full amount of PTP's fees was necessarily fraudulent.

43. As I have said, the allegation that the most likely inference to be drawn was that Grandlane was to receive some kind of secret commission was not abandoned but did not bulk large.

Fraud: the evidence

44. I next set out the evidence that has emerged, in part at least, from the pre-action disclosure. I say in part because there was some earlier voluntary disclosure but the relationship or overlap between the two was not explored before me. What I set out below is derived from the documents to which I was taken in the 5 lever arch files of disclosure provided on 27 February 2019.

45. Following the termination of Grandlane's engagement, Grandlane wrote to PTP on 2 November. The letter was sent by e-mail addressed to Peter Tigg of PTP (and copied to

Satish Patel of PTP) and followed a meeting the previous day. The letter confirmed that Grandlane's appointment on the Beaurepaire project had been terminated and that, as a consequence, PTP was asked to suspend work. Grandlane further said:

> "we have been requesting as is the normal course of events your fees on a monthly basis from our client Mrs Baturina. We have however been advised in the correspondence from Skymist …. that our own fees & that of our Sub-Consultants will not be paid.
>
> We intend to pursue Mrs Baturina for the unpaid fees, including those of PTP & will keep you updated on the progress of those negotiations."

The reference to the normal course of events reflected the fact that Skymist had indeed regularly made monthly payments of £20,000 or later £30,000 in respect of PTP's fees. Payments had been made from December 2013 until September 2017.

46. On 9 November 2017 PTP responded saying that they had taken legal advice and that Grandlane's letter was not a suspension in accordance with PTP's contract but a termination of which PTP had not been given proper notice. PTP said that it would, therefore terminate its services. PTP identified four outstanding invoices amounting to £180,480 including VAT and stated that, in accordance with clause 5.17 of their Appointment, they were assessing the amount due following termination.

47. The same day, Mr Deinis e-mailed PTP (again Mr Tigg, copied to Mr Patel) in response. He said that Grandlane was disappointed that PTP had decided to terminate its services since Grandlane was seeking to settle its differences with Mrs Baturina and Grandlane had no desire to be in conflict with PTP. He further took issue with PTP's invoices:

> "The level of your invoices is however not reflective in the work undertaken recently, especially as we requested that you suspend [your] management on the project on 02.10.17, other than attendance at the site meetings until we could seek clarity on the desires of our employer. You have also duplicated September invoice amounts."

Grandlane indicated that it wished to discuss options for release of documentation; that it could arrange a deal where PTP would be paid; and that it would "put aside" its own fees with its legal team.

48. Skymist submits that at this point Grandlane was behaving properly but that that conduct then evaporated. It seems to me that it also shows Grandlane seeking to remain on good terms with PTP for commercial reasons.

49. On 13 November 2017, there was a response to this e-mail from Ms Hogan at PTP seeking to clarify PTP's invoices.

50. Subsequently, as set out above, Grandlane's then solicitors sent their pre-action protocol letter dated 27 November 2017. On 9 December 2017 Grandlane e-mailed PTP saying that its solicitors had sent a "pre court protocol" letter to Mrs Baturina with evidence of

Grandlane's agreement and payments, adding *"If confirmation or statement required from PTP, can I please ask you to assist?"*. Mr Matthew QC submitted that this request for assistance marked a change in Grandlane's conduct.

51. Mr Tigg responded by e-mail on 11 December 2017 saying that PTP would provide whatever statements or confirmations were required.

52. On 13 December 2018, Mr Deinis then e-mailed Mr Patel, copied to Mr Tigg in the following terms:

> "I had a conversation with our barrister … who I'm meeting tomorrow at 11am and he had said that he would prefer to have a separate meeting dedicated only to our particular matter with architect. He wants to review the appointment documentation and other papers we had throughout this year's (sic), managing the project. He is not willing to make any comment without a comprehensive study."

53. At this point, therefore, it seems that Grandlane was taking legal advice on its claims against Skymist and that a conference with counsel had been fixed; that there had been some discussion between Grandlane and PTP about PTP's fees which were included in that claim (and that is borne out by Mr Patel's response); and, as Grandlane said, that counsel instructed wished to have a separate conference about those fees.

54. Mr Patel responded the same day, saying that he trusted that Grandlane would present to their lawyers the draft final account which PTP had handed to Grandlane recently but pointed out that the account was based on the original estimate (which was around 3 years old) and that the current scheme involved features that would result in a considerable increase in costs.

55. Mr Patel recorded his understanding that the legal advice Grandlane had received was that it was acting as agent for Mrs Baturina which Mr Patel said would be helpful to PTP. The e-mail concluded:

> "Finally, we note you will mention at the meeting with the Barrister that PTP Appointment disputes can only be dealt with by arbitration and not legal proceedings. The question here is how would this work in practice if PTP are to pursue a claim alongside or separately or jointly or any other way in this matter. Presumably this is one of the points for discussion."

56. Mr Deinis responded the same day. He referred to various documents as proof of agency which he said were being looked at by solicitors and that:

> "We will definitely address our position and structure of appointments with the consultants, so we can draft our statement correctly in our final letter to EB. We shall send you a feedback straight after the meeting, so when you e-mail Vasily & Elena, we're on the same page or if we are going legal, that would be

> the best way to proceeding in order to receive the outstanding's (sic)."

57. By this time it is apparent that Grandlane and PTP were, to some extent at least, co-operating with a view to recovering from Skymist the sums outstanding to PTP. The PTP e-mail makes plain that there had been a meeting and discussion between Grandlane and PTP but also that PTP had presented a "draft final account" claim, as anticipated in the termination letter on 9 November 2017. PTP also indicated that that was not the full amount of their claim. The e-mail also makes it apparent that there had been some discussion as to the appropriate or best way in which to advance the claims of PTP against Grandlane alongside Grandlane's claims against PTP and that that was intended to be the subject of legal advice. Skymist say, or will in due course and in other proceedings say, that this was in breach of Grandlane's duties as Skymist's agent because Grandlane was not acting in Skymist's interests - and indeed was acting against Skymist's interests - in encouraging PTP to advance claims for fees which would be passed on to Skymist. On the other hand, Grandlane was exposed to these liabilities and may well be said to have had a legitimate interest in determining its exposure and ensuring that that was covered by Skymist. PTP had indicated some intention of pursuing claims (greater than the amounts of the outstanding invoices and based on a greater Construction Cost) and could do so in adjudication and/or arbitration which would potentially leave Grandlane exposed to costs and fighting in two directions. It is a matter for another court whether Grandlane's actions in those circumstances amounted to a breach of duty. The issue for me is whether there is clear and unambiguous evidence of fraud and thus far the correspondence between Grandlane and PTP does not provide such evidence.

58. On 14 February 2018, Mr Deinis e-mailed Mr Patel. The e-mail attached documents relating to PTP's appointment and Grandlane's appointment as agent. Mr Deinis went on to say that, following the meeting the previous day, the barrister had suggested *"two ways of legal proceeding against EB without looking at the appointment document between GL and PTP."* He indicated that the advice received was to concentrate on the pre-action letter and await a response but that if no agreement was reached, a claim would be issued against Mrs Baturina: *"One of this claims will be yours but as I have explained above, the mechanism of how it's could be done I will address to you later on today or tomorrow."*

59. Mr Patel replied saying that from the documents it was clear that Grandlane acted as agent and asking whether the barrister agreed. Mr Deinis responded confirming that the barrister had no doubts that Grandlane acted as an agent, not a principal, and concluding *"Once I have a suggested legal approach of how we can proceed with your claim in writing, as agreed, I will forward this to you for discussion."* Mr Patel commented that the barrister's views made the fact that Grandlane had acted as an agent all the more clear. He said that he presumed that the "pre-court letter" would include PTP's claim for the invoices raised but also further additional claims based on the draft final account and *"presumably the letter will <u>leave it open for any and all claims by PTP yet to be finalised</u>"* (my emphasis). Mr Deinis replied: *"Exactly right, PTP, GL has to claim the full amounts, as we both were on monthly cashflow accounts basis."* All of that e-mail exchange took place on 14 February 2018.

60. On 20 February 2018, there were further e-mails exchanged between Mr Deinis and Mr Patel about whether the pre-action letter had gone out. There was also reference to some correspondence between PTP and Mrs Baturina and the prospect of an agreement for limited services between PTP and Skymist. Mr Deinis concluded that the letter would be issued that week and if Mrs Baturina ignored it *"then we can plan of how we will proceed with claim, including PTP's final account."*

61. There appears to have been a little e-mail traffic after this and then an exchange of e-mails on 7 March about the interim injunction obtained against Grandlane and PTP's appointment by Skymist.

62. Then on 13 March 2018, Mr Deinis e-mailed Mr Patel saying that he had not heard from him since the last e-mail. He asked whether PTP had entered into an agreement with Skymist. In respect of claims against Skymist he said: *"Our solicitor are now preparing structure for a joint claim, they have confirmed that's easy done. We need to agree on legal cost between ourselves and possibly proceed with the claim."*

63. Skymist places some emphasis on the reference in this e-mail to a joint claim which, it is submitted, evidences Grandlane acting in breach of its duties as agent. The reference would appear to mean that Grandlane would put forward to Skymist both its claims and PTP's claims. Whether that evidences a breach of Grandlane's duties as agent is a matter which may well be explored further in the Commercial Court proceedings but it seems to me a step too far to infer from this some agreement that Grandlane will take a share of any recovery made in respect of PTP's fees.

64. This e-mail also contained the first mention of legal costs. PTP's response was as follows: *"We appreciate your solicitors preparing a joint claim. We can also appreciate this will keep costs down as costs can be shared. Can we meet or if you can come to our office tomorrow to discuss this will be the best way forward so that we can understand the proposal for the joint claim."*

65. The next e-mail I was taken to was from Mr Patel to Mr Deinis on 13 April 2018. In relation to a direct agreement with Skymist, Mr Patel said that PTP was providing very limited services to Skymist. He continued:

> "We suggest we meet your solicitors to discuss the issues following which we can decide the direction for our fee recovery in respect of outstanding invoices and final account yet to be finalised."

66. Mr Patel referred to Grandlane's position that it had acted as agent, which was supported by the legal advice Grandlane had received but suggested that PTP would itself need to appoint solicitors and take legal advice. As I read that, the reference to the direction for fee recovery meant whether a claim was to be against Grandlane or Skymist directly and that was the matter on which PTP would need to take legal advice particularly if it was not confirmed that Grandlane acted as agent.

67. It appears that a meeting was then set up and held, it seems from the e-mails arranging it, on Friday 18 May at the offices of Goodman Derrick, Grandlane's solicitors. It was certainly sometime prior to 21 May 2018. On 21 May 2018, Ms Russak of Grandlane e-mailed Ms Hogan (copied to Messrs Deinis, Tigg and Patel). The e-mail referred to a recent meeting between Mr Deinis, Mr Patel and solicitors and said that she would like to finalise "our final account". She then referred to the invoices set out in the e-mail from PTP on 13 November 2017. She made the point that one of the invoices was, in summary, a substitute for two invoices and not an additional sum. That left 3 invoices outstanding and a total of £145,440 (including VAT). I note that the e-mail did not appear to take into account the further claim submitted by PTP or any other claims based on an increased Construction Cost that PTP had indicated it might have. It certainly invited no further claims from PTP.

68. There was then an e-mail from Mr Deinis to Mr Patel dated 8 June 2018 which came at the end of a chain arranging the meeting at Goodman Derrick's offices. Mr Matthews QC placed considerable emphasis on this e-mail. The e-mail said this:

> "It is time to build a claim against Skymist.
>
> I had another meeting with Richard and we came to agreement that Skymist is the employer.
>
> …"

69. I assume that Richard is Mr Bailey of Goodman Derrick who has sworn witness statements in this matter. It is the words "build a claim" on which Mr Matthews QC places such emphasis because he says they show that what is being suggested is that Grandlane and PTP work together on a claim against Skymist and build up that claim. That is a possible meaning of the words used but no more than that. The words are equally capable of meaning "put the claim together". Against the background set out above, the e-mail also seems to me to reflect the fact that Mr Bailey had reiterated the advice that Grandlane acted as an agent for Skymist so that any claim was to be made against Skymist. An agent's seeking advice as to what claims may be made against its principal and how could hardly itself amount to a breach of duty, let alone evidence fraud.

70. On 11 June 2018 Mr Patel responded saying that he was pleased with Mr Deinis' conclusions, that PTP was currently finalising the invoice, and that he would be keen to talk to Mr Deinis. It appears that some discussion did take place because on 14 June 2018 Mr Patel then emailed Robin Goddard of the quantity surveyors, Leslie Clark, who had been involved in the project. Mr Patel said that Mr Deinis had agreed that PTP should approach Mr Goddard for a professional estimate for the proposed works "based on a fair and reasonable amount for the works." That was to be based on the full set of drawings prepared. Mr Patel said that he would provide his own assessment based on costs assumptions PTP had made and they would then issue an invoice to Grandlane. Mr Patel asked Mr Goddard to prepare a considered "Estimate" to back up the costs PTP submitted or alternatively PTP would wait until Mr Goddard provided his Estimate. PTP undertook to cover Mr Goddard's costs (which it said were not for Grandlane to pay).

71. On the one hand, it is apparent from this e-mail that Grandlane was facilitating PTP's access to the project quantity surveyor for the purpose of ascertaining the relevant

Construction Cost or Estimate on which PTP's fees claim would be based. PTP had said all along that it had such a claim in mind. PTP was clear that it was seeking a fair and reasonable assessment on which to base its fee calculation and that it was prepared to wait for Mr Goddard's assessment rather than issue an invoice based on PTP's figures. That was to the benefit of all involved because it meant that PTP's fees claim would be based on the project quantity surveyor's figure and avoided a dispute about the appropriate figure.

72. Mr Patel then forwarded PTP's Building Costs Review on 18 June 18 (copied to Mr Deinis). Mr Deinis e-mailed Mr Goddard (not copied to anyone at PTP) on 19 June 2018. He said this:

> "…. I do understand PTP's point in relation to the complete design of all possible areas.
>
> However, we should consider factual matters first:
>
> Enabling works done and value are known as per tender
>
> Phase 1+ variations completed and known to use as per tender
>
> Phase 2 tender pack was ready by 70% excluding finishes and stone work, was presented but not approved.

So my point is, if you are going to make calculations and estimate for PTP we should be in line with known values, as per tender pack, plus potential cost of the finishes. I believe that PTP has escalated psqf procing (sic) up to £800 and this is not exactly right.
I do agree that architects can make such assumptions based on known design, however, actual & presented cost should be considered.
…."

73. Mr Selby QC submits that that e-mail shows that Grandlane was not in illegitimate cahoots with PTP and certainly not doing anything to inflate PTP's claim. On the contrary, Mr Deinis was seeking to persuade Mr Goddard that PTP's costs estimate was overstated and pointing out to him matters that should be taken into account to reach a lower figure. On 21 June 2018 Mr Goddard e-mailed both Mr Deinis and Mr Patel. He said that he needed a clear basis for estimating the base scheme; that he had looked back in his files for the first design information he received in January 2014; and he gave a link to a Dropbox file which contained the information he thought should form the basis of the base "country house" estimate. Mr Deinis responded promptly, copied to Mr Patel. Having set out a little of the history of the project he said:

> "In my opinion we could calculate this project costs as we wish but I would rather put myself in other party shoes for a moment and looked at this as proportions.
>
> We could submit the highest anticipations in terms of finishes for example but it could not be accepted, as we never had a complete design …. if we are about to make indicate assumptions, we should look at the market around.
>
> That's my view."

74. Again that e-mail can be read as Mr Deinis working with PTP on their claim but what, on the face of it he was doing, was exhorting Mr Goddard to assess a reasonable cost which was not inflated (despite the fact that it could be) and which reflected the market.

75. Leslie Clark's estimate was sent to Mr Deinis and Mr Patel on 17 July 2018 and Mr Deinis passed that on to Mr Bailey, his solicitor, saying that PTP now has "a base for their claim numbers".

76. The same day, by e-mail, PTP sent to Grandlane a letter and invoice. The letter referred back to PTP's letter dated 9 November 2017 and said that it accordingly attached its invoice dated 17 July 2018. The invoice set out a lengthy calculation of the fees claimed based on an estimated Construction Cost of £34,853,000, percentages complete of RIBA work stages, and the agreed 7% fee. The total came to nearly £2 million. PTP then added sums for expenses bringing the total to a little over £2 million. In total, as I have said, PTP then claimed £1,120,890 as outstanding.

77. Later that day, Mr Patel e-mailed Mr Deinis telling him that PTP had now issued its invoice and that he could go through it if necessary. Mr Deinis replied:

> "I have reviewed Robin's [Mr Goddard's] number and do believe we shall now have a complete understanding of our position regards claim against Skymist.
>
> We will issue claim letter tomorrow. I have paid Richards services for the claim documents draft and initial response. As agreed we need to discuss our financial arrangements for the purpose of adjudication, as we have substantial bill from your firm."

78. Mr Patel responded the same day (and before he went away for a week):
"Thank you. As explained before we are agreeable to paying costs [of] the adjudication. We agree we should talk and agree whatever is reasonable so there is no confusion. We can seek an estimate from Richard for the adjudication costs….."

79. Then, as set out above, Grandlane issued its invoices to Skymist ostensibly dated 28 October 2017.

80. The first adjudication was, of course, abortive. The pre-action disclosure includes a text message from Mr Deinis to Mr Patel saying: *"We have a bill from Mr Silver first adjudicator; shall we split it as agreed?"* to which Mr Patel replied *"Yes we can split"* which is also relied upon by Skymist of the agreement of a financial benefit to Grandlane for the presentation of PTP's claim.

81. There was no further document that showed what, if anything, had in fact been agreed about the payment of the adjudicators' fees or Goodman Derrick's costs (or any other costs) in the adjudication. There was, however, an e-mail from Mr Patel to Mr Deinis on 20 November 2018 asking him to forward Goodman Derrick's invoices relating to the adjudication.

82. So far as Mr Riches' fees of £35,524.80 (plus VAT) were concerned, he decided:

> "In the first instance Grandlane shall pay my fees and expenses. Both parties shall remain jointly and severally liable for those fees and expenses.
>
> Skymist shall be liable for the whole of my fees and expenses."

83. I take that as meaning that the parties would, in the normal way, be jointly liable and that Mr Riches could bring proceedings against either or both of them for unpaid fees. He expected his fees to be paid by Grandlane in the first instance, but Skymist was liable for those fees, and should pay the same amount to Grandlane.

84. Skymist seeks to rely on the fact that Grandlane had, to date, paid only half of the adjudicator's fees as evidence that there is an agreement between Grandlane and PTP to share those fees. Again, that may be so, but it is equally consistent with Grandlane wishing Skymist to pay a half share directly. Skymist has refused to do so and its solicitors have stated that they are not, and will not, be instructed to accept service of any claim for the adjudicator's fees which will then have to be served on Skymist in the British Virgin Islands.

Discussion

85. What lies behind the allegation of fraud seems to me to be the key point first made by Mrs Baturina, namely that the claim in respect of PTP's fees increased dramatically from that indicated in November 2017 and that it was passed on almost immediately by Grandlane. What the documents now disclosed show is how that came about and there is nothing surprising or inherently suspicious about it. At the time of termination, Skymist said it would make no further payments to Grandlane or in respect of any consultants. Grandlane's first claim in November 2017 sought to recover its own fees and what had already been invoiced by PTP. However, PTP had indicated that there was more to come. Grandlane was exposed to that liability; Grandlane was not in funds to discharge that liability; and Grandlane would, in the normal course, have expected PTP's fees to be paid by Skymist. Grandlane faced the risk of having to fight on two fronts, adjudicating, or otherwise seeking to resolve, PTP's claim against it and bringing its claim against Skymist. By agreeing to take PTP's claim to Skymist, Grandlane was seeking to mitigate its own exposure and it doubtless made commercial sense to wrap everything up into one adjudication.

86. It can be seen from the sequence of events that Grandlane anticipated an invoice from PTP based on a revised estimate of the construction cost. Grandlane was aware of the figures being presented to the quantity surveyor and had passed its comments to the quantity surveyor. To that extent, Grandlane may be said to have "encouraged" PTP to present their fees claim. But there is nothing from which it could be inferred that Grandlane was seeking to inflate the claim either because it would receive a secret commission or some other financial advantage. On the contrary, PTP's fees claim was to be based contractually on the construction cost. What that cost was was referred to the project quantity surveyor and Mr Deinis's contributions to that exercise sought to reduce not inflate the estimated figure.

87. I note further that Mr Matthews QC disavowed any criticism of PTP who he accepted were acting in their own legitimate commercial interests. That does not sit with a case either that Grandlane and PTP colluded to inflate PTP's claim or that Grandlane was to benefit financially from that. Nor does the fact that there is no suggestion of impropriety on the part of Leslie Clark, the quantity surveyors, on whose estimate the PTP fees claims is based.

88. It may be that it transpires, in due course, that the case that Grandlane acted in breach of duty gives rise to a claim on behalf of Skymist. Skymist's case in that respect is at the very least arguable. But it does not seem to me to follow that prima facie evidence of an alleged breach of duty amounts to clear and unambiguous evidence of fraud. Stripped of the agency relationship, the course of action that Grandlane took would appear to be have been a sensible or at least understandable course of action, and not a fraudulent one. Further, once that course had been embarked upon, Grandlane acted with the advice of both solicitors and counsel. There is nothing to suggest that Grandlane/ Mr Deinis were acting dishonestly and it would be remarkable if there were given that they were acting on, or with the advice of, both counsel and solicitors.

89. Mr Matthews QC, in my view, sought to read too much into the e-mail from counsel asking to deal with the architects' matters in a separate conference and which he argued showed that counsel was alive to the need for PTP to be distanced from Grandlane. The e-mail on its natural reading simply seems to me to mean that counsel considered that the issues on PTP's claim merited a distinct conference. There is no indication that, rightly or wrongly, any legal adviser of Grandlane's has had reservations about its presentation of PTP's claim in adjudication.

90. Further, it does not seem to me that the "secret" financial benefit derived from any agreement between Grandlane and PTP as to the payment of costs adds anything. Again, it may be the case that Skymist establishes that it evidences or amounts to a breach of Grandlane's duties as its agent and/or Mr Deinis's further alleged fiduciary duties but it is not clear and unambiguous evidence of fraud.

91. Mr Matthews QC's submissions however go still further. What he submits is that the effect of <u>any</u> agreement between PTP and Grandlane as to payment of costs is that Grandlane necessarily presented a fraudulent claim to Skymist. That is closer to, although put rather differently from, the allegation that first saw the light in correspondence and witness statements. As set out above, the submission that he makes is that any such agreement results in Grandlane receiving a financial benefit such that Grandlane's liability to PTP is reduced by whatever amount PTP is obliged to pay to or on behalf of Grandlane. Grandlane, he submits, could not, therefore, be entitled to be indemnified in the full amount of PTP's fees claim, as it claimed in the adjudication that it was, but only to the full amount of the fees claim less that part of the costs that PTP was to pay. It follows, Mr Matthews QC submits, that if a claim for the full amount was made in the adjudication that claim was necessarily fraudulent.

92. I cannot accept that submission. As I understand it the argument follows from the fact that, if Grandlane is liable to PTP in the sum of X but PTP is liable to Grandlane in the sum of Y, the net liability of Grandlane to PTP is X minus Y. However, Grandlane's

liability to PTP for fees pursuant to the contract between them was what it was – it was the amount of fees for which Grandlane was liable. That liability is not reduced by some agreement that PTP would pay for something different, namely the cost of pursuing a claim for that amount of fees in adjudication. Whilst there might be an entitlement to set-off, that would not alter Grandlane's liability for fees in respect of which it sought an indemnity. In any case, if I am wrong about that, it does not necessarily mean that the claim to an indemnity in the full amount of the fees was fraudulent, merely that it was overstated. It cannot sensibly be said that Mr Deinis must have known this was a dishonest claim or was reckless as to whether it was, not least because he had full legal advice on Grandlane's making of the claim. To continue the theme of irony from Waksman J's judgment, the irony of Skymist's submission is that, in the adjudication, Skymist argued that Grandlane only had a contractual entitlement to payment and not a right to an indemnity and, if that were the case, the argument would not even arise.

93. In short, there is no clear and unambiguous evidence of fraud in this case. In any case, I would have accepted Mr Selby QC's submission that fraud, as a defence to the claim in the adjudication, could and should have been raised in the adjudication. Mr Matthews QC submits that it could not have raised the matters that it now knows about as a result of the pre-action disclosure, but that misses the point. On Skymist's own case, Mrs Baturina had her suspicions of collusion and secret commissions by the time of and during the course of the adjudication. Indeed, disclosure was asked for by solicitors for that reason and the fact that disclosure was not given fuelled her suspicions. Those were all matters that could have been raised in the adjudication. It may be that, absent any further evidence, the adjudicator would not have found fraud but, in that case, it may have been open to Skymist to raise the issue on enforcement, if, as it submits has happened here, it had found further evidence of fraud (which was not available in the adjudication). As it is, it is not.

The application to adjourn

94. The matter does not, however, rest there because, as I have said, Skymist's alternative case is that I should adjourn the hearing – or at least the decision on whether to grant summary judgment. Skymist has a continuing suspicion that there is somewhere clear and unambiguous evidence of fraud and it is submitted that the evidence of the conduct of Grandlane thus far is sufficient to give rise to the inference that there may well be more to come.

95. Skymist relies on the failure, and it says suspicious failure, to disclose any agreement with PTP about payment to Grandlane for making PTP's claim. In particular, reliance is placed on the fact that on more than one occasion, Grandlane denied that there was any such agreement whereas the evidence I have referred to above makes it clear that there was some sort of agreement. In my view that overstates the position and is self-serving. What was put to Grandlane and their solicitors on more than one occasion in correspondence was that there was "collusion" between Grandlane and PTP. The term collusion in the context in which it was used was something that carried with it the implication that something had been done that was improper. It is hardly surprising that the response was a denial of "collusion". One cannot read into that a dishonest attempt to keep from Skymist any agreement as to the payment of costs of the adjudication which I infer seemed to Grandlane and its advisers wholly innocent. It was further submitted

that Grandlane had never positively denied in evidence that there was no agreement with PTP to "take a cut". That submission entirely reverses the burden of proof.

96. What I was told in the course of the hearing was that the further documents which are now sought on the renewed application for pre-action disclosure are documentation relating to the meeting shortly before 21 May 2018 (which was a meeting with legal advisers) and documentation which is claimed to be privileged and in respect of which Skymist argues that Grandlane's solicitors have misunderstood or misapplied the test for privilege. As Mr Selby QC submitted what Skymist seeks to do here is also to reverse the burden of proof. Skymist says that if there was nothing to hide, anything it seeks would have been disclosed, as would the full terms of any agreement between Grandlane and PTP in respect of the payment of costs of the adjudication. Since this has not been disclosed, it is submitted that I can infer that there is something suspect. That Mr Selby QC submits, and I agree, reverses the burden of proof.

97. In this context, Skymist referred me to the decision in *Arsenal Football Club plc v Elite Sports Distribution Ltd.* [2002] EWHC 3057 (Ch). That case concerned the use of certain photographs; there had been no application for pre-action disclosure; and there was now an application to strike out. The judge, Geoffrey Vos QC (as he then was), considered that the court could make an order for disclosure at this stage to whether the claim was, as the defendants said, doomed to fail. At paragraph 36 he said:

> "The defendants have stoically refused to cooperate with the claimants to give any information, to make any disclosure. They say that it is contrary to their commercial interest to do so, but it seems to me that if they had an absolute defence to the claim and the allegations made against them were wrong it would be in their interests, and not contrary to their commercial interests, to produce disclosure that is sought to demonstrate to the claimants that they had acquired the information lawfully."

98. In my judgment, that decision was an exercise of the court's case management powers. It sets no precedent as to how I should approach this case and it has to be borne in mind that it arose in the very different context of a determinative application to strike out and not an application to enforce the decision of an adjudicator which is itself only temporarily binding.

99. Skymist further submits that I should also take into account other aspects of Mr Deinis' or Grandlane's conduct all of which point to misconduct, even if falling short of fraud, on their part, and support the argument that my decision should await further disclosure. Some of these matters are further relied upon in relation to the submission that there should be a stay of execution.

100. The first matter relied upon is Mr Deinis' alleged use of confidential information. This claim arose out of events following the termination of Grandlane's engagement. It was Mrs Baturina's case that, immediately, following the termination, Mr Deinis arranged to forward or have forwarded (it is not apparent to whom) an e-mail from Ms Russak to Mr Deinis attaching two corporate structure charts which contained confidential information

belonging to Mrs Baturina and Global Assets Advisory Services who provide management services to Mrs Baturina. Mrs Baturina sought injunctive relief, obtaining an interim injunction on 2 March 2018 which was renewed on 29 April 2018. The claim was subsequently compromised in January 2019 by Mr Deinis' agreement to a permanent injunction against the use of this material.

101. The second matter is Grandlane's overclaiming in the adjudication. Mr Matthews QC emphasised that Grandlane's claim had been significantly overstated by around £600,000. It appeared to be the submission that that in itself was some form of misconduct or suspicious. The differences in the amounts claimed and the amounts awarded by the adjudicator arose primarily from two matters. The first was his decision as to the appropriate amount on which the 0.5% fee should be claimed. The second was Grandlane's understating of the sum it had been paid which related to the parties' dispute as to how fees should be allocated to different projects. These were matters fully canvassed in the adjudication. There is no inference of improper conduct (even if relevant) to be drawn from them. Grandlane no more overclaimed than did Skymist.

102. All these matters amount to no more than, as Mr Selby QC put it, mud-slinging. None of them gives me reason to believe that further relevant evidence is likely to emerge from pre-action disclosure. I should note that this judgment was reserved, after the hearing, for which there was a 2 hour time estimate, lasted until 4.40pm. That length of hearing was perhaps to be expected given the 10 lever arch files (not including authorities) provided to the court, yet neither party had made any application for further court time. In the meantime, I have not been made aware of any further hearing in the Commercial Court or of any date being fixed.

103. Without determining the renewed application for pre-action disclosure myself – and it is not before me - there is nothing in what has been disclosed that could lead me to believe that there is anything else to be disclosed which would amount to clear and unambiguous evidence of fraud. Tempting though it might be to let that application run its course before deciding the present application, it seems to me that that would be wrong in principle and would allow the application for pre-action disclosure - which, by definition is not made in these proceedings, and is admittedly wider in scope than any issues arising on adjudication enforcement - to drive the decision on enforcement.

104. Therefore, I do not adjourn the application and, for the reasons I have given, I grant summary judgment.

Stay of execution

105. The Defendant's then further alternative position is that there should be a stay of execution.

106. The principles are again clearly set out in the well-known judgment of Coulson J (as he then was) in *Wimbledon v Vago* [2005] EWHC 1086 (TCC) with the addition of a further sub-paragraph (g) in the light of the decision of the Court of Appeal in *Aygun Gosvenor London Limited v Aygun Aluminium UK Limited* [2018] EWCA Civ 2695, upholding the

decisions of Fraser J at first instance. Those principles (omitting the references to authorities in the quotation) are as follows:

"a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind.

d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay.

e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted.

f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or

(ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator.

g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay"

107. So far as sub-paragraph (g) is concerned, Coulson LJ in *Gosvenor* held that the party who asked for a stay had to meet the same high test of evidence of risk of dissipation as a party seeking a freezing order (paragraph 39). That test was that there must be a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets.

108. Skymist submits that there is clear evidence that Grandlane will be unable to repay the judgment sum and/or is unable to pay its debts as they fall due which is capable of amounting to special circumstances justifying a stay.

109. Grandlane has filed accounts up to the end of December 2017. Those accounts show a fairly consistent position. On the balance sheet, its total assets less current liabilities had been around £20,000. Turnover has varied between about £2 million and £4 million and Grandlane has enjoyed a small net profit under £10,000. Its management accounts to the end of December 2018 (which do not take account of any sums awarded in the adjudication) show net assets of £46,361; turnover of only £488,141; and a net profit of £20,745.

110. Skymist submits that Grandlane has further liabilities not reflected in the accounts which include (i) a potential liability to an interim payment on account of costs in the proceedings for injunctive relief, which Grandlane disputes, and (ii) its liability to PTP which exceeds the amount which Grandlane has, in fact, been awarded in the adjudication. Taking account of those debts or potential debts, it is, Skymist submits, obvious that Grandlane could not repay the amount of the adjudicator's decision. I should add that the hearing of the application for an interim payment on account of costs was fixed for hearing on 8 March 2019.

111. Grandlane submits firstly, however, that it falls squarely within sub-paragraph (f)(i) of the *Vago* principles. Grandlane's current financial position and reduction in turnover is entirely the outcome of the withdrawal of the work provided by Mrs Baturina and her companies, including Skymist. Mrs Baturina of all people knew the financial position of Grandlane. From the outset it was a company that had, in effect, been set up to manage property developments for her and had as its sole source of income the work that she and her companies provided. It is now in the same position.

112. Mr Matthews QC argues the contrary, namely that the position of Grandlane is very different. At the time of contracting, it was a financially viable company with a work stream and an income stream, a healthy balance sheet, and a healthy profit and loss account. That is not so now because Grandlane no longer has the work stream and income that Mrs Baturina and her companies provided. That seems to me to be circular. The company was one that had no financial standing or source of income other than the work and fees paid by Mrs Baturina. The position is still the same. Indeed, by that measure, the only difference is that Grandlane has now taken steps to obtain work streams other than that provided by Mrs Baturina.

113. If that were not right, it would create a situation in which this claimant could never enforce an adjudication against its primary client because the defendant could, by the simple expedient of withdrawing its support, render the claimant unable to repay the adjudication sum, unless that sum was preserved intact. It cannot be right as a matter of policy in the enforcement of adjudicators' decisions to allow that situation to arise.

Risk of dissipation

114. Sub-paragraph (g) now added to the *Vago* principles is expressly addressed to the risk that the claimant will organise its financial affairs so as to dissipate the adjudication sum so that it would not be available to be repaid. Firstly, I do not take that as referring to the adjudication sum in the sense of a discrete pot of money but rather as referring, at least where a party has other assets, to the dissipation of an amount equivalent to the adjudication sum with the intention of creating a situation in which the same sum cannot be repaid. Secondly, I repeat that, as Coulson LJ said in *Gosvenor,* the test for establishing a real risk of improper dissipation of the adjudication sum is a high one.

115. In his judgment at first instance [2018] EWHC 227 (TCC), at paragraph 60.3, Fraser J added:

> "The addition of this further principle is not designed to prevent a claimant form dealing with the adjudication sum in the

> ordinary course of business, or make evidence of what a claimant may be intending to do in the future, in the ordinary course of business, relevant or admissible under this head. The whole purpose of adjudication decisions being summarily enforceable would be frustrated if all a winning party in an adjudication could do with any payment was to place it in an account, and not use it, to avoid the risk of a stay of execution. That is not the purpose of principle (g)."

116. There is nothing in the decision of the Court of Appeal to cast doubt on that observation and I agree with it. It would, as Fraser J. said, make a nonsense of the purpose of adjudication being, in many instances, to provide cash flow. That may not be the case here but it should make no difference to the court's approach. In fact, the position here is that what Grandlane ought to do with any monies received from the adjudication is account for them to PTP. That would be a proper payment in the course of Grandlane's business and not an improper dissipation of the adjudication sum.

117. There is scant other evidence that there is a real risk of Grandlane dissipating any other assets so as to avoid repayment. Mr Deinis' evidence is that Grandlane is still trading and that is consistent with the management accounts to 2018. Mr Deinis' evidence was that Grandlane has been seeking to diversify its work from commercial development only. He said that Grandlane was in negotiations with potential shareholders and lenders to establish a new development model and "in the meantime we continue to work for private families mostly from Russia and the Ukraine".

118. Grandlane's offices were apparently located with those of Mrs Baturina and her companies. After they parted company, Grandlane moved to offices at 37 Brook Street, London W1. In June 2017, Grandlane entered into a 12 month licence to occupy those premises. On 27 June 2018, Grandlane entered into a further 12 month licence with a break clause after 6 months which Grandlane operated. Mr Deinis, somewhat inaccurately, said that a 6 month extension had been agreed. Grandlane currently has no office premises. Mr Deinis says that it is moving to offices in the City but there is no documentary evidence to support that assertion. It may be said to be some indication that Grandlane does not intend to continue trading but that is speculation.

119. It is also the case that a further Grandlane company, called Grandlane Homes Limited ("Homes"), was set up in November 2016 - that is well before Skymist terminated Grandlane's engagement - to carry out work for private clients including construction and management. That would appear to overlap with the work Mr Deinis says Grandlane is still carrying out but there is no evidence of works being deliberately diverted from Grandlane to Homes. Mr Deinis' wife was given substantial control of Homes in the autumn of 2018. It is not entirely clear what Skymist suggests can be inferred from that but it falls well short of the evidence that the court would require to establish a real risk of dissipation.

120. As I said above, Mr Matthews QC also prays in aid other aspects of Grandlane's financial position and conduct. I take these in the order in which they appeared in the skeleton argument of Mr Matthews QC, Mr Choat and Mr Leary:
    (i) the first matter is the state of Grandlane's accounts and the point that the adjudication sum would not satisfy the fees due to PTP. That is simply another way of seeking to rely on Grandlane's financial position absent the support of Mrs Baturina.
    (ii) Secondly, it is said (and supported by the evidence of Mr Bagshaw of Stephenson Harwood and Mr Gorbachev, a chartered accountant at Global Assets Advisory Services) that Grandlane misappropriated £200,000 paid by Skymist for the purpose of paying Grandlane's consultants which was instead paid to Grandlane's staff and for other purposes. This allegation was raised in the adjudication. I was told that it was dealt with in the adjudicator's decision at paragraph 255. This is the adjudicator's calculation of the amounts paid to Grandlane in respect of the Beaurepaire project, there being two other projects at Fairholt Street and Montpelier Street. Mr Riches' calculation is based on discounting the total "by the value of the other two projects". He made no adverse comment about Grandlane and no finding that Grandlane had misappropriated funds. It would run contrary to the adjudicator's decision if I were now to find that Grandlane had, in fact, misappropriated funds and to rely on that as evidence of a real risk of dissipation. It seems to me that this issue may instead have been the subject of Skymist's claim for a credit of £212k which the adjudicator rejected.
    (iii) Thirdly, Skymist relies on the misappropriation of confidential information. This is a separate matter, not a reason to stay execution.
    (iv) Fourthly, Skymist says that, on the application for pre-action disclosure, Mr Deinis gave false evidence that full disclosure had already been given; that highly material documentation was not disclosed until 27 February 2019 pursuant to Teare J's order; and that even now full disclosure has not been given. That is simply an attempt to rely on the evidence that has failed to persuade me that there is clear and unambiguous evidence of fraud and that has failed to persuade me to adjourn this application in another guise.
    (v) Fifthly, Skymist relies on the fact that in the adjudication, Grandlane understated the amounts that it had been paid by Skymist and that it is inexplicable that it failed to recognise the payments made. I repeat what I said at sub-paragraph (ii) above.
    (vi) Sixthly, Skymist relies on the fact that Grandlane sent Skymist an invoice for payment of its fees plus VAT dated 12 October 2017 and did not, until the Referral, admit that it had backdated the invoice. I have not been taken to the correspondence about this but it was obvious on the face of the invoice that Grandlane was claiming sums that had not been invoiced to it until July 2018. Backdating the invoice may well have been intended to reflect the position as at termination. It certainly exposed Grandlane to a claim for unpaid (and undeclared) VAT. It may have been intended to gain some advantage in terms of interest but, in the event, none was sought. The point goes nowhere.

121. None of these matters is, individually or cumulatively, sufficient evidence of a real risk of dissipation of the adjudication sum. What Skymist seeks to do is rely on the same matters that it had relied on for its case as to fraud and stay of execution on the basis that it is probable that Grandlane will be unable to repay the adjudication sum to argue that there is a real risk of unjustifiable dissipation. That evidence simply does not go far enough.

122. Accordingly, I do not grant a stay of execution.