Neutral Citation Number: [2009] EWHC 1120 (TCC)

Case No: HT-09-142

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

St. Dunstan's House

133-137 Fetter Lane

London EC4A 1HD

Date: Thursday 7th May 2009

Before:

MR. JUSTICE COULSON

- -

Between:

BOVIS LEND LEASE LIMITED **Cla**

- and -

COFELY ENGINEERING SERVICES **Defe**

- -

- -

MR. ADAM CONSTABLE (instructed by **Messrs. Wragge & Co. LLP**) for the **Claimant**

MISS CHANTAL-AIMÉE DOERRIES QC (instructed by **Messrs. Mayer Brown International LLP**) for the **Defendant**

- -

Judgment

MR. JUSTICE COULSON:

1. Introduction

1.
It is sad but true that buildings which win architectural awards and might be regarded as truly outstanding designs are just as prone to construction disputes as the average speculative development. Court buildings are certainly not immune from this. As long ago as 1874, there was a lengthy and difficult dispute involving the masons working on G.E.Street's new Royal Courts of Justice Building on the Strand which led to the controversial employment of European workers to break the strike. This claim arises out of an ongoing series of subcontract adjudications in connection with the new Civil Justice Centre in Manchester, surely one of the finest public buildings of the last 30 years.

2.
The claimant was the main contractor on this flagship project. By a subcontract executed as a deed, and dated 5th January 2005, the claimant engaged the defendant to carry out and complete the

mechanical and public health works. The subcontract sum was £9,651,946.70. To date, there have been four previous adjudications, each referred by the defendant and in which the same adjudicator, Mr. Tony Bingham, was nominated by the RICS. However, following the commencement of Adjudication 5 by the defendant on the morning of 1st April 2009, the claimant purported to start a separate (sixth) adjudication. Although the subject-matter of Adjudication 6 was the same or similar to that raised by Adjudication 5, the claimant sought to refer it to Mr. Rob Smith, a senior partner of DLE. It appears that Mr. Smith is unavailable or unwilling to act as an adjudicator and he has nominated one of his partners to act instead. I am now asked to determine, as a matter of construction of the subcontract, which adjudicator has the necessary jurisdiction to deal with this new dispute.

3.
There are, I think, four issues arising out of this Part 8 claim. First, there is an issue as to the proper construction of the Subcontract. Secondly, there is the defendant's fallback position that, if they are wrong as to the construction of the Subcontract, the terms are so unclear that the court should conclude that there was no enforceable express arrangement, such that the Scheme for Construction Contracts should apply instead. Thirdly, there is an issue as to whether, following the four adjudications, the claimant is estopped from challenging the jurisdiction of Mr. Bingham to deal with Adjudication 5. Finally, there is an issue arising out of the events in Adjudication 2, as a result of which the defendant submits that Mr. Bingham gave a binding decision as to his jurisdiction, which decision was subsequently affirmed by the claimant and which was binding on the claimant at the time of the commencement of Adjudication 5.

4.
I propose to deal with those issues in this way. I set out the relevant terms of the subcontract in **section 2** below. At **section 3**, I set out a brief history of the previous adjudications. At **section 4,** I address the construction issue; at **section 5,** I address the Scheme issue; at **section 6,** I deal with the estoppel issue; and, at **section 7,** I deal with the issue relating to the alleged binding decision on jurisdiction. There is a brief summary of my conclusions at **section 8**. I am very grateful to both counsel for their concise and realistic submissions.

2. The Relevant Terms Of The Subcontract

2.1 The Subcontract Documents

5.
The relevant subcontract documents for the purposes of these issues are:

(a) the Articles of Agreement, including the Appendix;

(b) the Schedule of Subcontract Amendments;

(c) the DOM/2 standard conditions; and

(d) the Schedule of Main Contract Amendments.

2.2 The Articles and the Appendix

6.
Article 3 provided that:

“If any dispute or difference arises under the subcontract either party may refer it to adjudication in accordance with clause 38A.”

7.
The Appendix to the DOM/1 subcontract, which follows immediately after the Articles, was divided into a number of different parts. Part 1 section A related to the second recital and set out information relating to the Main Contract and the Main Contract Works. Part 1 section B set out the entries in the “Main Contract Appendix 1”. This demonstrated, amongst other things, that, under the Main Contract, each of the four possible adjudicator nominating bodies (namely the RIBA, the RICS, the Construction Confederation and the NSCC), had each been deleted. Instead, by the side of the printed reference to “Adjudication – nominator of Adjudicator” and clause 39A.2.2 (a term of the Main Contract, not the Subcontract) there were these words:

“Rob Smith of Davis Langden & Everest or if unavailable or unwilling to act such other partner of Davis Langden & Everest who shall be nominated by the senior partner from time to time.”

8.
Parts 2 to 8 of the Appendix to the DOM/1 Subcontract were all concerned with the Subcontract itself. Part 8 read as follows:

“Article 3/38A.2.1

The nominator of the Adjudicator shall be the President or a Vice President or Chairman or a Vice Chairman [of]…

•
Royal Institute of Chartered Surveyors”

Each of the other three printed options (namely, the RIBA, the Construction Confederation and the NSCC), have each been struck through in pen. Underneath, the printed words carry on:

“If no nominator is selected the nominator shall be the President or a Vice President of the Royal Institute of Chartered Surveyors.”

2.3 The Subcontract Amendments

9.
Article 12 was introduced by the Schedule of Subcontract Amendments. It provided:

“Without prejudice to clause 2, this Subcontract shall be amended in accordance with the Schedule of Amendments at DOM/2 attached hereto and if there is any discrepancy between the terms of this Subcontract and the Schedule of Amendments, the wording of the said Schedule shall prevail.”

10.
There are a number of amendments relating to adjudication. The unamended version of DOM/1 defines the adjudicator as “any individual appointed pursuant to clause 38A as the Adjudicator”. The amended version that was agreed defines the adjudicator as “the individual named in the Appendix as the Adjudicator or the individual appointed as the Adjudicator pursuant to clause 38A”. Although the bulk of clause 38A, dealing with the mechanics of the adjudication provisions, was unamended, clauses 38A.2 and 38A.3 were deleted and replaced with new provisions.

11.
The unamended version of clauses 38A.2 and .3 read as follows:

“.2 The Adjudicator to decide the dispute or difference shall be either an individual agreed by the Parties or, on the application of either party, an individual to be nominated as the Adjudicator by the person named in the Appendix part 8 (‘the Nominator’) provided that:-

.1 no Adjudicator shall be agreed or nominated under clause 38.A.2.2 or clause 38A.3 who will not execute the Standard Agreement with the Parties and

.2 where either Party has given notice of his intention to refer a dispute to adjudication then

- any agreement by the Parties on the appointment of an Adjudicator must be reached with the object of securing the appointment and of the referral of the dispute or difference to the Adjudicator within 7 days of the date of the notice of intention to refer (see clause 38A.4.1);

- any application to the nominator must be made with the object of securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer;

.3 upon agreement by the Parties on the appointment of the Adjudicator or upon receipt by the Parties from the nominator of the name of the nominated Adjudicator the Parties shall thereupon execute with the Adjudicator the JCT Adjudication Agreement.

.3 If the Adjudicator dies or becomes ill or is unavailable for some other cause and is thus unable to adjudicate on a dispute or difference referred to him, the Parties may either agree upon a person to replace the Adjudicator or either Party may apply to the nominator for the nomination of an adjudicator to adjudicate that dispute or difference; and the Parties shall execute the JCT Adjudication Agreement with the agreed or nominated Adjudicator.”

12.
The amended version of these clauses was in these terms:

“38A.2 The Adjudicator to decide the dispute or difference shall be the individual named as the Adjudicator in Appendix 1 with whom the Parties have executed the “Standard Agreement for the appointment of an Adjudicator named in a Contract” issued by the Joint Contracts Tribunal (the “JCT Adjudication Agreement for an Adjudicator named in a Contract/Subcontract/Agreement”) provided that unless the Parties have otherwise agreed the individual is not an employee of or otherwise engaged by either Party.

38A.3 If the Adjudicator dies or becomes ill or is unavailable for some other cause and is thus unable to adjudicate on a dispute or difference referred to him, the Parties may either agree an individual to replace the Adjudicator or either Party may apply to the person named in Appendix 1 provided that if the Adjudicator named in Appendix 1 is unable by reason of illness or other clause to adjudicate on a dispute or difference referred to him any appointment under clause 39A.3 shall not terminate the Adjudication Agreement of that individual with the Parties.”

2.4 Other Matters

13.
It should also be noted at the outset that:

(a) At no time had the parties to these proceedings entered into a tripartite agreement with Mr. Rob Smith, the Adjudicator named in the Main Contract Appendix 1, either in the form of the JCT Standard Agreement for the appointment of an Adjudicator, or in some other form.

(b) I asked whether there was such an agreement in place in relation to the Main Contract but it was unclear whether there was or not.

3. A Brief History of the Previous Adjudications

14.
It is, I think, unnecessary to set out in any detail the history of the previous adjudications. However, given that there have been four such adjudications, each of which were decided by Mr. Bingham following his nomination by the RICS, I think it is helpful to outline briefly what each involved.

3.1 Adjudication 1/19 th October 2007

15.
The dispute related to the wrongful withholding of around £198,000 by the claimant from sums otherwise due to the defendant. It seems that initially the defendant was considering approaching Mr. Smith to act as the adjudicator, but eventually they sought an appointment of an adjudicator from the RICS. Mr. Bingham was nominated by the RICS on 22nd October. On 21st November he decided that the money had been wrongfully deducted by the claimant. No jurisdiction point was taken by the claimant as to the jurisdiction of the RICS to act as the nominating body, or the jurisdiction of Mr. Bingham to act as adjudicator.

3.2 Adjudication 2/15 th April 2008

16.
The dispute concerned the defendant's entitlement to an extension of time in relation to some discrete matters relating to delay. Mr. Bingham was nominated by the RICS on 18th April 2008. This time the claimant did take a jurisdiction point, arguing that Mr. Smith was the appropriate adjudicator. Mr. Bingham concluded that he did have the necessary jurisdiction and, although the claimant properly reserved its rights and participated in the adjudication on that basis, no further jurisdiction point was taken either during the adjudication or thereafter. The decision dated 23rd June resulted in a partial extension of time in favour of the defendant. It appears that some of the defendant's claims failed.

17.
It should also be noted that, on 8th July 2008, the claimant's solicitor wrote to Mr. Bingham asking him to make various typographical and other clerical corrections to his decision in Adjudication 2. On 10th July, the solicitor clarified the claimant's position by saying that, "In mentioning these minor technical slips we do not seek to challenge your decision, merely to correct these items …"

3.3 Adjudication 3/11 th August 2008

18.
The dispute concerned a number of variation claims relating to design. Mr. Bingham was nominated by the RICS on 12th August and issued his decision on 6th November. He found largely in favour of the defendant. At no time during Adjudication 3 did any point arise as to Mr. Bingham's jurisdiction.

3.4 Adjudication 4/2 nd September 2008

19.
The dispute concerned the defendant's entitlement to a further extension of time. Again it seems that this was limited to discrete delay issues. Mr. Bingham was nominated by the RICS on 4th September and issued his decision on 16th October. He found that the defendant was entitled to a further

extension of time. At no time during Adjudication 4 did any point arise as to Mr. Bingham's jurisdiction.

3.5 Adjudications 5 and 6

20.
As noted above, at about 7.40 on the morning of 1st April 2009, the defendant served a notice of adjudication by fax. This was Adjudication 5. The dispute concerned the defendant's claim for a further extension of time and appeared to involve (I think for the first time) a comprehensive review of all factors involved in the delay. At 7.50 a.m. on the same day, the defendant applied to the RICS to nominate an Adjudicator. Mr. Bingham was nominated on the morning on 2nd April 2009.

21.
After close of business on 1st April, at about 5.30 pm, the claimant issued its own notice of adjudication: this is Adjudication 6. That did not refer to Adjudication 5, but was accompanied by an application to DLE for Mr. Rob Smith to be appointed as Adjudicator. As I have indicated, Mr. Smith is apparently either unavailable or unwilling to act and he has nominated another DLE partner in his place.

4. The Construction Issue

4.1 Principles

22.
In this case, neither side can say that the wording of the Subcontract points unequivocally to a result in their favour. Each side has to accept that, even taking their case at its highest, there are infelicities of drafting, cross-referencing and the like, which cannot be easily resolved. In such circumstances, there are both general and specific principles relevant to the approach to be adopted by the court. First, it is important that the court should endeavour:

(a) To construe the document as a whole (**The Apostolis No 2**) [2002] Lloyd's Rep 337, and to give effect to each part of the contract wherever possible (**Tektrol v. International Insurance Company** [2005] 2 Lloyd's Rep 701);

(b) To apply a sensible and commercial interpretation of the words used (**Mannai Investment Company Limited v. Eagle Star Life Assurance** [1997] AC 749.

23.
In addition, where those aims may not be entirely reconcilable, there are further applicable principles, including the following:

(a) Written, stamped or typed words which are inconsistent with printed terms usually take effect by superseding the latter (**The Starsin** [2004] 1 AC 715);

(b) When construing contracts of this sort, deletions and amendments to standard form terms are a legitimate tool to aid interpretation (**Team Services v. Kier Construction** (1993) 63 BLR 76).

24.
By applying these general principles, I have come to the overwhelming conclusion that the defendant's construction of the Subcontract is to be preferred, and that it is the RICS - and thus Mr. Bingham - who have the necessary jurisdiction. My reasons for that conclusion are set out below.

4.2 The Appendix to the Subcontract

25.
In my judgment, the Appendix to the Subcontract is the most important subcontract document for the purposes of this application. That is for two distinct reasons. First, that is because clause 2.2 of the DOM/2 conditions says that it is. Clause 2.2 is in the following terms:

"If any conflict appears between the DOM/2 conditions and the Appendix then the Appendix shall prevail. If any conflict appears between the terms of Subcontract DOM/2 and the numbered documents the terms of Subcontract DOM/2 shall prevail. If any conflict appears between the provisions of the Main Contract and the terms of the Subcontract documents the terms of the Subcontract documents shall prevail."

It is clear therefore that the Subcontract itself provides that the Appendix is the most important document.

26.
The second reason for concluding that the Appendix is the key document is because it is the one document included in the Subcontract which the parties have filled out themselves. As noted above, where there is a clash between manuscript and standard printed words, the former must prevail.

27.
The Appendix records that, in the event of a dispute there will be an adjudication: that is set out in Article 3 and the reference there to clause 38A. Clause 38A deals with the mechanics of the adjudication itself. How will the adjudicator be appointed? The intelligent reader looking for an answer to that question passes over Part 1 sections A to D of the Appendix (because they are solely concerned with the Main Contract), and goes on to the later Parts of the Appendix, including Part 8. That, on its face, is the Part expressly dealing with the nomination of the adjudicator under the Subcontract. It contains an express reference back to Article 3. In the present case, Part 8 has been the subject of an unequivocal series of manuscript amendments which delete all possible nominating bodies except the RICS (see paragraph 8 above).

28.
Mr. Constable argued that Part 8 of the Appendix was neutral because there was a contrary reference to Mr. Smith in Part 1B of the same Appendix. Whilst there is such a reference to Mr. Smith, I do not accept that this reference somehow counterbalances or neutralises the reference to the RICS in Part 8. That is because the reference to Mr. Smith is expressly made by reference to a summary of the Main Contract arrangements only. That is why it refers to clause 39A, a clause in the Main Contract, but not the Subcontract. Part 1B of the Appendix (and thus the reference to Mr Smith) is, on the face of it, irrelevant to the defendant's Subcontract. On the other hand, Part 8 is expressly concerned with that Subcontract, and has been carefully amended so as to delete all other possible nominating bodies, and to identify the RICS as the relevant nominating body for the purposes of the Subcontract.

29.
It seems to me that, notwithstanding the clarity with which it was made, the fundamental difficulty with Mr. Constable's submission (that a proper construction of the Subcontract leads to the conclusion that Mr Smith was the agreed adjudicator), was that it required me to ignore Part 8 of the Subcontract Appendix altogether. That is despite the fact that it is, as I have said, the one place where the parties have taken up a pen to make clear their specific agreement as to the process by which an adjudicator will be nominated, and have done so in a document that takes precedence over everything

else in the Subcontract. It seems to me that to ignore Part 8 of the Appendix would be contrary to the general principles of construction set out above.

30.
On that basis alone, therefore, it seems to me that, as a matter of construction of the Subcontract, the parties agreed that the nominating body would be the RICS. I do not believe that any other interpretation of the relevant provisions is possible.

4.3 Clauses 38A.2 and 38A.3

31.
Do the words of clauses 38A.2 and 38A.3 (paragraph 12 above) make any difference to that conclusion? I accept Mr. Constable's submission that those amendments could be seen as an attempt to move from a nominating body arrangement to an arrangement with a named Adjudicator. But in my judgment, there can be no doubt that, as a matter of construction, any such attempt has wholly failed.

32.
First, as I have already noted, there is the hierarchy stipulated in clause 2.2. Even if Mr. Constable were right on all other matters relating to these contractual terms, he would simply have demonstrated that there was a conflict between the conditions as amended, and Part 8 of the Appendix. In such circumstances, as we have seen, the Appendix must take precedence. That is a complete answer to his submission.

33.
Secondly, it seems clear that the words in clauses 38A.2 and 38A.3 have been imported from the Main Contract, which may explain why, on analysis, there are so many difficulties with the scheme that is outlined there. By way of example, I note that there is no "Appendix 1" to the Subcontract. Appendix 1 is a Main Contract document. Of course the defendant is not a party to that Contract. More importantly for present purposes, I think, is the fact that Mr. Smith is not someone with whom the claimant and the defendant had or have ever executed a tripartite JCT Adjudication Agreement. The defendant has never entered into such an agreement with Mr. Smith. Accordingly, it is not possible to read those clauses as somehow referring to Mr. Smith because, contrary to these words, there was no an agreement between the parties to the Subcontract that he would act as their Adjudicator.

34.
Mr. Constable submitted that, as a matter of construction, these words did not necessarily mean that a tripartite agreement had to be in existence at the same time as the Subcontract. I disagree with that. The words "with whom the parties have executed" – past tense – can only mean that. Otherwise, if the parties had intended to refer to the possibility of a tripartite adjudication agreement in the future, the contract would have said "have executed or will execute".

35.
Although a lesser point, I should also note that clause 38A.3 is not in fact consistent with the manuscript addition that has been added to Part 1B of the Appendix. That, I think, also stems from the fact that these clauses have not been entirely thought through, having been imported without analysis from the Main Contract in a way that seems to me to take no account of the amendments to Part 8 of the Subcontract Appendix.

4.4 Clarity

36.

Looked at as a matter of commercial common sense, it does seem to me that there is a clarity about the defendant's construction of the Subcontract on this issue which is missing from the claimant's case. The defendant simply points to Article 3 and then Part 8 of the Appendix to show an express and particular agreement that the RICS will nominate an adjudicator.

37.
The claimant, on the other hand, has to say that it was Mr. Smith who was the nominated adjudicator, but they can only get there by:

(a) Ignoring Part 8 of the Subcontract Appendix altogether;

(b) Amending "Appendix 1" to read "Part 1B of the Appendix";

(c) Ignoring the absence of a tripartite JCT Adjudication Agreement or any other agreement with the adjudicator;

(d) Accepting that the reader does not get the identity of the nominator from those parts of the Appendix dealing with the Subcontract where it is habitually found. Instead, on the claimant's case, the reader has to go to clause 38A.2 and then, having taken the steps at (b) and (c) above, is then required to go back to that part of the Appendix expressly dealing with the Main Contract to discover the identity of the Subcontract adjudicator.

I consider that such a case is much too convoluted to amount to a proper construction of the Subcontract.

38.
Of course it can sometimes be less than helpful to say of the parties' submissions in a case like this, "Well, if that is what they meant, they should have said so." After all, if there was not a lack of clarity in the first place, there would be no issue before the court: see section 2.13 of **'The Interpretation of Contracts'**, 4th Edition, 2007. But it is, I think, legitimate to say that the claimant's case relies on a very circuitous route to get the identity of Mr. Smith when, if that really had been the parties' intention, they could have simply amended Part 8 of the Appendix to refer to him by name, in just the same way as they had written his name into Part 1B. The absence of any reference to Mr. Smith in Part 8, and instead the setting out of a completely different scheme involving the RICS is, for the reasons that I have given, fatal to the claimant's construction of the Subcontract.

4.5 Summary

39.
For all those reasons, I conclude that, as a matter of construction of the Subcontract, the parties agreed that the RICS would be the nominating body. The claimant is not therefore entitled to the declaration that it seeks by way of CPR Part 8 that Mr. Smith was the agreed adjudicator.

40.
Although this conclusion means that it is strictly unnecessary for me to go on and consider the remaining issues, out of deference to counsel's careful arguments, I set out briefly my views on those issues below.

5. The Scheme Issue

41.

If I was wrong to favour the defendant's construction, then I would conclude, with a certain amount of regret, that the parties had failed to provide a valid express agreement, capable of being enforced, as to the method by which an adjudicator would be nominated. I agree with Mr. Constable that a court should endeavour to avoid such an outcome. But if I was wrong about the primacy of Part 8 of the Appendix, I would be left with two wholly conflicting routes to a nominating body. In those circumstances, as a matter of construction, I could not find that there was sufficient clarity in the claimant's case to allow me to uphold it. I point in particular to the matters I have set out in **sections 4.2 to 4.4** above.

42.
In those circumstances, without an enforceable express agreement, Part 1 of the **Scheme for Construction Contracts (SI 1998 No 649** would be implied into the Subcontract. This provides for a number of different adjudicator nominating bodies to which the referring party might go, including the RICS. On the face of it, therefore, if I was wrong to conclude that the defendant's construction was correct, but right to find that, in such circumstances, the position was wholly muddled, then the terms implied by law – namely the Scheme - would supply the answer. In my judgment that would again confirm that Mr. Bingham, nominated by the RICS, had been correctly appointed.

43.
Mr. Constable suggested that this might not be right because, on this scenario, Mr. Bingham would have been wrongly appointed under express terms when he should have been appointed under the implied Scheme. In my judgment, on the facts of this case, that would not affect his jurisdiction. Unlike the situation in **Pegram Shopfitters Limited v. Tally Weijl (UK) Limited** [2003] EWCA (Civ) 1750, there is no dispute here about the existence or otherwise of a binding contract. Moreover, on this basis, there could be no dispute that the RICS had the jurisdiction to nominate Mr. Bingham, so the point in **Lead Technical Services Limited v. CMS Medical Limited** [2007] EWCA (Civ) 316, where there were two competing nominating bodies, would not arise either.

44.
Thus it seems to me that if the Scheme applied, Mr. Bingham would have the necessary jurisdiction to take up and deal with Adjudication 5.

6. The Estoppel Issue

45.
The defendant's alternative case on estoppel is a narrow one. It operates only if, contrary to my primary and secondary conclusions, the claimant's case on construction is right. It maintains an alleged common assumption that the RICS was the correct nominating body. However, Ms Doerries accepts that it would not apply for the future because, on this scenario, I would have decided that the contract meant something different, and the RICS was not the correct nominating body. Accordingly, she limits the estoppel argument to the position pertaining at the time of the commencement of Adjudication 5, when she says the parties were operating on this alleged common assumption.

46.
In support of this case she relied on the well-known passage in the judgment of Bingham LJ (as he then was) in **The Vistafjord** [1988] 2 Lloyd's Rep 343 when he said:

"In **The Leila** [1985] 2 Lloyd's Rep 175 Mustill J held that estoppel by convention applied to prevent defendants from denying what had previously been mutually assumed, that their contract contained a provision which in fact it did not contain because it would not be conscionable to allow the defendants

to rely on the actual provision of the contract … In my judgment questions of what is just and conscionable inevitably arise in this area as Mr. Levy fairly conceded. Thus the court is not so rigid and inflexible as to insist on the parties being held to an assumed and incorrect state of fact or law when there is no injustice in allowing the party to resile therefrom … Further, if the estoppel applies it will only do so only "for the period of time and to the extent required by the equity which this estoppel has raised" (per Ralph Gibson LJ in **Troop v. Gibson**). Thus once a common assumption is revealed to be erroneous the estoppel would not apply to future dealings between the parties."

47.
If the argument had been relevant, I would probably have been prepared to find that there was a common assumption along the lines suggested, but I would have been most unhappy about going on to find that there was an operable estoppel. That is partly because, so it seems to me, in this case and on these facts, such an estoppel would be tantamount to a variation of the terms of the contract, in circumstances where there had been no consideration for such a variation.

48.
Perhaps more importantly, I would also not have found an estoppel because I do not accept that there would have been nothing unconscionable or unfair in respect of Adjudication 5. I note that the claimant does not seek to impugn the validity of the decisions in Adjudications 1 to 4. Had it endeavoured to run such an argument, I may well have found that it was estopped from doing so. On the other hand, the defendant accepts that the estoppel does not arise for the future if, on this scenario, I had found for the claimant on its construction of the Subcontract. So the only set of proceedings caught by the alleged estoppel would be Adjudication 5, which has not yet really started, because of the parties' sensible agreement to sort out the jurisdiction question at the outset.

49.
In those circumstances I would not have found that, if the claimant was right as to the contractual point, it was estopped from relying on its contractual rights in respect of Adjudication 5. There would have been nothing unconscionable, with the contractual issue having been decided against the defendant, in allowing Adjudication 6 to continue and ruling Adjudication 5 as a nullity before it was properly started.

7. The Issue As To The Binding Decision On Jurisdiction

50.
Miss Doerries's final submission was even bolder, although again it was only relevant if I was against her principal arguments as to construction (which I was not). She said that Mr. Bingham's decision on jurisdiction in Adjudication 2 was binding, not only in that adjudication, but until I had decided that the claimant's construction of the Subcontract was right. Thus, she said, it was binding at the time of Adjudication 5, and meant that the claimant could not argue that Mr. Bingham did not have the necessary jurisdiction.

51.
On the face of it, because Mr. Bingham's decision in Adjudication 2 was the subject of a subsequent application to make corrections and so forth, I believe that it could properly be argued that the parties agreed to be bound by his decision on jurisdiction in Adjudication 2. It seems to me that it is akin to those cases in which the courts have concluded that the parties agreed to give the adjudicator ad hoc jurisdiction to make a binding decision on his own jurisdiction: see, for example, **Nordot Engineering Services Limited v. Siemens plc** [2001] Construction Industry Law Letter 1778.

52.
But, so it seems to me, there was nothing to indicate that, by so doing, the parties were also agreeing that Mr. Bingham had the jurisdiction to deal with any future disputes. His jurisdiction to deal with any future disputes would have to be considered if and when those future disputes arose, not least because of the general principles that explain the close correlation between the particular dispute that arises in any given situation, and the jurisdiction of the adjudicator. Thus, the events in relation to Adjudication 2 had no prospective effect on subsequent adjudications, or Mr Bingham's jurisdiction to decide them.

53.
Accordingly, if I had concluded that the claimant's case on construction was right, I would not have found that Mr. Bingham had an agreed ad hoc jurisdiction because of what had happened in relation to Adjudication 2.

8. Conclusions

54.
For the reasons set out in **section 4** above, I conclude that, as a matter of construction of the Subcontract, the RICS were the appropriate nominating body, so that Mr. Bingham had the necessary jurisdiction to continue with Adjudication 5. Mr. Smith's nominee does not have the jurisdiction to continue with Adjudication 6.

55.
For the reasons set out in **section 5** above, I conclude that, if I was wrong about that, the position in relation to the express terms of the Subcontract was so confused that the Scheme for Construction Contracts would have to apply instead. That would again mean that the RICS and Mr. Bingham had the necessary jurisdiction.

56.
For the reasons set out in **sections 6 and 7** above, I conclude that if, contrary to my primary findings, I had concluded that the claimant's construction of the Subcontract was right, I would not have upheld the defendant's case on either estoppel or the primacy of Mr. Bingham's decision on jurisdiction in Adjudication 2.

57.
Thus, for the reasons set out in **sections 4 and 5** above, the claimant's Part 8 claim is dismissed.