Case No: HT-13-201/HT-13-139

Neutral Citation Number: [2014] EWHC 10 (TCC)

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

Royal Courts of Justice

Rolls Building, 7 Rolls Buildings

London EC4A 1NL

Date: 24th January 2014

Before :

MR. JUSTICE EDWARDS-STUART

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Between :

Twintec Ltd	**App**
- and -	
Volkerfitzpatrick Limited	**Respo**

- -

- -

Ms. Joanna Smith QC and Jonathan Chew Esq

(instructed by **Nelsons Solicitors Ltd**) for the **Applicant**

Paul Reed Esq, QC and David Pliener Esq

(instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondent**

Hearing dates: 9th December 2013; 18th December 2013

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Judgment

Mr. Justice Edwards-Stuart:

Introduction

1.
This is an application by Twintec Industrial Flooring ("Twintec") to restrain Volkerfitzpatrick Ltd ("VFL") from pursuing an adjudication which was commenced by a Notice of Adjudication dated 3 December 2013. Twintec was a sub-contractor engaged by VFL to construct the floor slabs for a substantial warehouse at Avonmouth, near Bristol.

2.
Twintec's primary contention is that the VFL has obtained the appointment of the adjudicator under a contractual provision that does not exist, and accordingly that the purported appointment of the adjudicator by the President of the RICS is a nullity.

3.

However, Twintec also contends that VFL should be restrained from pursuing the adjudication on other grounds. These are:

i)
That the adjudication seeks to undermine and circumvent the case management in the Main Claim by: (a) disrupting Twintec's ability to abide by the Court's timetable in that Main Claim; and (b) by seeking to obtain a result which was refused in the Main Claim.

ii)
That the adjudication fragments the existing proceedings by pursuing Twintec alone when the issue referred to adjudication is, in fact, a multi-party dispute.

iii)
That the adjudication is oppressive in that it imposes an unconscionable burden on Twintec.

iv)
That the adjudication has no real prospect of success.

4.
The application first came before the court on 9 December 2013 as an urgent application made on notice to VFL. Although there was insufficient time for a full hearing of the application on that occasion, I was satisfied on the basis of the submissions that I heard that I should grant interim relief until a further hearing could be arranged. A further hearing took place on 18 December 2013 at which the parties elaborated on and concluded the submissions made at the first hearing.

5.
Following that hearing I extended the grant of interim relief and reserved judgment. I should mention that the nominated adjudicator had indicated to the parties that he would be away from 20 December 2013 to 5 January 2014, and so the grant of interim relief until early January 2014 was in practice unlikely to have much effect on the progress of the adjudication were it to be permitted to continue.

6.
For the reasons given in this judgment I have concluded that this is a proper case for the grant of an injunction to restrain the further pursuit of this referral to adjudication.

The background

7.
As will be apparent from the brief summary of Twintec's grounds for seeking relief, the dispute that is the subject of this referral forms part of litigation that is already on foot in this court. Accordingly, this application has not been brought by way of a separate action, but under a provision in directions already given giving the parties general permission to apply to the court.

8.
The subject of the litigation is a very large warehouse and wine bottling plant near Bristol which was purpose-built for Accolade Wines ("Accolade"). Accolade contends that the floor of the warehouse is unfit for its purpose. Two of the grounds of complaint are that the piles supporting the floor slab are not properly founded and that the concrete floor slabs themselves have been defectively constructed by Twintec. The piling work was carried out by another sub-contractor, Keller Limited ("Keller").

9.

Twintec denies the allegations in relation to the construction of the floor slabs. Keller, for its part, denies that there is anything wrong with the piles; alternatively, it submits that the problems with the floor, such as they are, can be readily cured at fairly modest expense by a system of resin jacking. The other parties to the litigation, in which Accolade is the claimant, are the landlord of the building and its guarantor ("GJ 3" and "GJ 4"), VFL, as the main contractor, and Twintec and Keller as sub-contractors to VFL. There are also claims against Twintec and Keller by parties other than VFL based on direct warranties allegedly given by Twintec and Keller.

10.
Before the litigation began extensive testing of the warehouse floor and the subsoil beneath it had been carried out. This testing included full scale static load tests which were carried out and paid for by VFL. The cost of these tests was about £850,000.

11.
The dispute that VFL has referred to adjudication is the liability for the cost of these load tests. VFL contends that Twintec's poor workmanship in relation to the floor slabs is an effective (although not necessarily the sole) cause of the need to carry out the tests. VFL seeks to recover the costs of the tests either as damages for breach of contract or pursuant to an indemnity that it says was a term of the sub-contract with Twintec.

12.
Whilst the sum claimed in the Notice of Adjudication is not insubstantial, it is dwarfed by the sums claimed by Accolade in the litigation - some £170 million. A very substantial part of this claim is the cost of relocating Accolade's business to other premises whilst the remedial work is carried out to the warehouse floor.

13.
GJ 3 and GJ 4 also make their own claims against the other parties in respect of their liability to Accolade. This is therefore substantial and complex litigation. Although the trial is currently fixed to take place on 27 October 2014, it is possible that this may not be achieved. But in any event, as VFL's Commercial Manager, Mr. Nash, has pointed out, there will be no prospect of the court giving judgment before early 2015. Twintec was joined in the litigation fairly recently - in August 2013 - and was given an extension of time to 5 November 2013 in which to serve its defence, which it did.

14.
In November 2013 I gave directions, following a lengthy contested hearing, for further testing of the piles, the warehouse floor and the soil below it. Twintec's expert engineers have only recently visited the site for the first time, on 5 December 2013, and there was an all day meeting of the experts on 9 December 2013. I accept the assertion by Mr. Trees, Twintec's solicitor, in his witness statement that Twintec's experts will have to carry out a substantial amount of work in a very short period of time if they are to be in a position to comply with the timetable relating to expert evidence that has been set by the court.

15.
Although it was submitted by Mr. Trees that the timing of VFL's referral appeared to have been chosen for the collateral purpose of causing maximum disruption and pressure on Twintec's experts, Ms Joanna Smith QC, who appeared for Twintec, together with Mr. Jonathan Chew, did not pursue the point that the adjudication has been brought for the collateral purpose of applying improper pressure on Twintec in the context of the litigation. In my view, she was right not to do so.

16.
Since the principal ground advanced by Twintec for the grant of relief is the lack of jurisdiction of the adjudicator, I propose to address that issue first.

The letter of intent ("LOI")

17.
On 5 October 2007 VFL issued a letter of intent to Twintec authorising it to proceed with the work, in accordance with the documents identified in the letter, with a view to the parties entering into a formal sub-contract thereafter.

18.
It has been well established for some fifty years that, all other things being equal, where two parties enter into an agreement to carry out work in the anticipation that they will in future enter into a formal contract in respect of the work, if that formal contract is subsequently entered into it there may well be an implied term that the contract will govern the parties' relationship retrospectively: see Trollope & Colls Ltd v Atomic Power Constructions Ltd [1963] 1 WLR 333.

19.
In that case Megaw J (as he then was) summarised the argument against this proposition in the following terms:

"None of the terms of an offer is binding on the offeror until the offer is accepted. When the offer is accepted it does not apply retrospectively so as to govern relations between the parties during the period between offer and acceptance. In the present case the defendants could not vary the work to be done, so as to have any contractual effect, until the offer had been accepted. Therefore, if the offer had been accepted by the defendants on April 11, 1960, what would have been accepted would and could only have been the original offer, as set out in the tender, for certain specified works, coupled with the right of the defendants to vary the works after, but only after, they had accepted the offer and made the contract. Any purported variations possible by the defendants before April 11, 1960, would be ineffective, because it could not be made contractually until there was a contract which conferred the right to vary."

20.
Megaw J commented that logically this position was unassailable if, but only if, one were to assume that the acceptance of an offer cannot have retrospective effect so as to make the contract applicable to things done earlier in anticipation of the contract. He said that there was no principle of English law which provides that a contract cannot in any circumstances have retrospective effect or that, if it purports to have retrospective effect, it is in law a nullity. He concluded that in that case there was an implied term that contract was to have retrospective effect.

21.
In principle, there is nothing to prevent the parties entering into a binding contract on an interim basis pending the agreement of a formal contract setting out the full terms on which they wish to contract. As the decision in Trollope & Colls shows, that formal contract may then have retrospective effect so that it governs the parties' relations from the outset of the project. The books are full of examples of contracts made by a letter of intent and Akenhead J reviewed the relevant authorities in Diamond Build Ltd v Clapham Park Homes Ltd [2008] EWHC 1439 (TCC). I respectfully agree with and adopt his analysis of the authorities in that case.

22.
In this case the letter of intent of 5 October 2007 ("the LOI") was in the following terms:

"It is our intention to award you the Warehouse Slab works for all services as detailed within the documents listed below and attached, for the above project, but we are not yet in a position to enter into this Sub-contract.

Subject to the terms of this letter, we authorise and request you to proceed immediately with all works necessary to enable you to achieve the Design Programme and Construction Programme in accordance with the documents below.

a) Appendix A attached (and all documents referenced therein)

b) FCL minutes of Tender Review Meeting (duly signed and completed 28th September 2007).

Your total Sub-contract Sum for this project (should the project proceed through to Practical Completion) is agreed as £2,630,564.59, for all works as further detailed within the attached documents.

For the purposes of this letter only, FCL will reimburse you proven reasonable costs for such works satisfactorily completed up to the maximum sum of £2,630,564.59, as detailed within the above documents, excluding VAT. In the event that we are unable to conclude the appointment you shall be reimbursed for proven reasonable costs only, in line with the provisions of this letter.

Upon the issue of our formal Sub-contract Agreement, this letter will cease to have any effect and will be superseded by the terms and conditions of that Agreement."

23.
Twintec was asked to sign and return a copy of the letter, which it did. Both parties accept that this letter constituted a binding contract. But VFL also has an alternative case to the effect that, if it was not a binding contract, a binding contract came into existence subsequently. I shall deal with this case separately. On each party's primary case, the basic issue concerns the terms on which that contract was made. VFL's submission was that it incorporated the terms of the DOM/2 standard form of sub-contract, save only to the extent that those provisions were inconsistent with the terms of the letter of intent. Twintec submits that it constituted a binding contract by which it was authorised to proceed in accordance with the LOI (and the documents to which it referred) to carry out the work and that no other terms were incorporated.

24.
The facts of Diamond Build were very similar to those of the present case. The letter of intent there was in the following terms:

"Refurbishment Works to 16 NR Houses and 51 NR Flats – Clapham Park Estate London, SW4.

We confirm that it is our intention to enter into a Contract with you on the basis of a JCT Intermediate Form of Contract, 2005 Edition with further amendments as specified in the Specification upon which your tender of 2nd April 2007 was based on.

Clapham Park Homes Ltd wish that you now commit the appropriate resources to permit you to take possession by no later than 28 calendar days from the date of this letter and to regularly and diligently proceed with the refurbishment works to achieve an overall completion with 36 working weeks from the date of possession.

The Contract Sum will be £2,489,302.00 as set out in your tender.

Should it not be possible for us to execute a formal Contract with you in place of this letter, we undertake to reimburse your reasonable costs up to and including the date on which you are notified that the Contract will not proceed provided that the Supervising Officer is satisfied that those costs are appropriate and that, in any event, total costs will not exceed the sum of £250,000 …

Clapham Park Homes Ltd do not undertake to reimburse any anticipated profits for the works as a whole, nor actual costs or actual or theoretically incurred general or specific overheads arising after the date of notification that no further work is to be carried out.

You are to comply with the Construction (Design and Management) Regulations 2007 ('the CDM Regulations') and be the 'Principal Contractor' for the Project as defined in the CDM Regulations and fulfil in relation to the Project all the obligations of the Principal Contractor as set out in the CDM Regulations …

You are also to effect all insurances stipulated in the Form of Contract and Specification referred to above and relevant to the work undertaken pursuant to this letter.

It is hereby confirmed that the undertakings given in this letter will be wholly extinguished upon the execution of the formal Contract.

Please confirm receipt of this letter and indicate acceptance of its terms by signing and returning the enclosed copy where shown."

25.
Akenhead J said that this letter of intent in that case gave rise to a contract in itself. He gave these reasons:

i)
Whilst the first paragraph of the Letter of Intent merely confirmed an intention to enter into a contract, the second paragraph effectively asked Diamond Build to proceed with the work.

ii)
There was an undertaking in effect pending the execution of a formal contract to pay for Diamond Build's reasonable costs, albeit up to a specific sum.

iii)
The fact in the penultimate paragraph that the undertakings given in the latter part of the letter were "wholly extinguished" upon the execution of the formal contract pointed very strongly to those undertakings having legal and enforceable effect until the execution of the formal contract.

iv)
The fact that the Specification referred to in the letter required a contract under seal demonstrated that the parties were operating with that in mind.

v)
The very fact that Diamond Build was asked to (and did) sign in effect by way of acceptance the Letter of Intent pointed clearly to the creation of a contract based on the terms of the Letter of Intent itself.

26.
Akenhead J described the contract that was made in that case in this way:

“Although this is a simple contractual arrangement, it has sufficient certainty: there is a commencement date, requirement to proceed regularly and diligently, the completion date, and overall contract sum and an undertaking to pay reasonable costs in the interim.”

27.
Almost exactly the same points can be made about the LOI in this case. However, there are significant differences between the two letters. One difference is that in Diamond Build the letter of intent did not include the words “in accordance with the documents below”, but instead the opening paragraph of the letter of intent referred specifically to the form of contract into which they intended to enter, and the relevant amendments to it, all of which was as set out in the tender. The other, and in my view very significant, difference was that VFL stated very clearly in the first sentence of the LOI that it was not then in a position to enter into the sub-contract (whether on the DOM/2 or any other terms). In my judgment, this would be fatal to any submission that the parties, having agreed all the relevant terms, must be taken to have concluded a contract on the basis of the terms of the DOM/2 form (as was held in the cases of Bryan and Langley v Boston [2005] EWCA Civ 973 and Harvey Shopfitters v ADI [2003] EWCA Civ 1757). It was no doubt for this reason that Mr. Paul Reed QC, who appeared for VFL, together with Mr. David Pliener, did not make any such submission.

28.
In the present case, there is no requirement to proceed with the works regularly and diligently, as in Diamond Build, but there is a requirement to proceed “… with all works necessary to enable you to achieve the Design Programme and Construction Programme”. That in my view is equally capable of providing sufficient certainty in relation to time.

29.
The work that Twintec was to carry out was that described in the documents referred to in the LOI. There was no room for argument about what it had to do. So far as the price is concerned, if a formal sub-contract was not concluded Twintec was to be reimbursed its reasonable costs for work satisfactorily completed. That is a perfectly clear and adequate form of remuneration.

30.
However, it seems to me that this is a case where the parties must have intended that the formal contract, once entered into, would have retrospective effect so as to govern the work carried out up to that point as well as the work carried out subsequently. In my view that is clear from the penultimate paragraph of the LOI: to supersede something means to replace that thing in its entirety. If that is correct, then it was necessary for Twintec to carry out the work in such a manner that it would not put itself in breach of any of the terms in the standard form of sub-contract once it had been entered into. This would involve complying with a number of the terms of the DOM/2 form of sub-contract.

31.
By contrast, if there was an event that gave rise to delay, Twintec would have to issue the relevant notice if it was to protect its position once the formal sub-contract was entered into. However, if the formal sub-contract was not entered into, any such notices given by Twintec would have no impact on its entitlement to recover its proven reasonable costs under the terms of the LOI. But I do not consider that it can be said that dictates of business efficacy require a term to be implied that Twintec would comply with every term of the DOM/2 conditions: reverting to the example of a notice of delay, if Twintec failed to observe the conditions of DOM/2 in relation to the giving of such notices, it would do so at its peril. The sub-contract, whether that contained in the LOI or the formal sub-contract if concluded, would remain workable - notices or no notices.

32.
The real question in my opinion is what is meant by the requirement to carry out the work “in accordance with”, amongst other things, the DOM/2 form of sub-contract. As I have said, VFL’s submission is that this meant that the LOI incorporated all the terms of DOM/2 (as described in Twintec’s letter of the 27 September 2007 and the notes of the meeting of 28 September 2007) save to the extent that such terms were inconsistent with the express terms of the LOI.

33.
When considering this submission I pause to ask which terms of DOM/2 would be inconsistent with the LOI. Two come immediately to mind. First, the provisions relating to valuation. These would be displaced by the entitlement to be paid a reasonable sum for work satisfactorily completed (limited to the sub-contract price). Second, the provisions relating to termination in DOM/2 are not consistent with the LOI. The contract represented by the LOI could be terminated, in my view, if the parties were unable to agree on the terms of the formal sub-contract. By definition that is not a situation that could arise once a formal sub-contract was concluded. I cannot think of any other terms of DOM/2 that are inconsistent with (rather than supplemental to) the terms of the LOI, at least no terms of any significance.

34.
Thus the effect of VFL’s case is that Twintec would effectively be bound by all the terms of DOM/2 save for those dealing with the sum payable for the work and with termination. In relation to the former, Twintec’s entitlement under the LOI is to be reimbursed its reasonable costs of the work satisfactorily carried out, rather than its value. In relation to the latter, Twintec’s engagement was, in effect, capable of being terminated simply by VFL deciding that it was not willing to enter into a formal sub-contract. In fact, VFL’s pleaded case in the litigation goes further in that it is asserted that VFL retained the right to cancel the LOI at any time. Whichever is correct, this would have the result that Twintec would be bound by all the obligations imposed by the DOM/2 conditions without having the benefit of the DOM/2 rights in relation to payment and termination.

35.
In addition, it is a consequence of VFL’s submissions that Twintec would effectively be deprived of any opportunity to negotiate any of the terms of the proposed formal sub-contract. It may be that it would have been content to accept the sub-contract in the form that might have been proffered by VFL, but that is not the point. In fact, there is a letter dated 31 January 2008 from Twintec to VFL which refers to a letter from VFL “enclosing the subcontract”. However, neither party has been able to find a copy of that letter or the sub-contract that was enclosed with it. The letter went on to say that Twintec had reviewed the proposed sub-contract on which it had a number of comments - which were then set out in the letter. In my view, this letter is typical of the type of exchange that one would expect following the acceptance of the LOI when the parties were subsequently negotiating the final terms of the formal sub-contract.

36.
It is also to be noted that in several places the DOM/2 standard form contains various alternatives, one or more of which have to be deleted. If Mr. Reed’s submission is correct, there would be no method of dealing with this because where there are alternatives the relevant options would either have to be chosen unilaterally by VFL or simply left unresolved. Neither is a satisfactory solution: in the first case VFL would be able to impose terms which it would otherwise have been Twintec’s right to negotiate. In the second case the relevant option would not have been agreed (unless the wording provided for a default position).

37.
An example relevant to the present case is that Part 8 of the Appendix to DOM/2, provides for choices of nominating body for the nomination of an adjudicator. In the copy that appears in the bundle (at page 671 of the exhibits to witness statement of Mr. Trees), three of the options have been crossed out, leaving only the Royal Institute of Chartered Surveyors. There is no evidence before the court that Twintec had agreed to this, or that it had even seen it: it may well be that it is the version of the sub-contract that VFL was proposing to send to Twintec for agreement. Further, it has not been submitted on VFL's behalf that this is a question that further evidence or enquiry might resolve.

38.
Whilst in some cases the parties may be indifferent to the identity of the nominating body, I can well envisage that in certain types of contract one or both of the parties might well regard the identity of the nominating body as important. For example, it may be thought that the type of adjudicator usually selected by one nominating body may not be suitable to resolve the type of dispute likely to arise under a particular project. This is just the sort of point that could be the subject of negotiation when the terms of any formal sub-contract are being discussed.

39.
As it happens, the default selection for the nominating body is the Royal Institute of Chartered Surveyors ("RICS"). So if the position is that the LOI had incorporated the terms of the DOM/2 standard form, but without any choice being made where form provides for alternatives, the nominating body for an adjudicator would be the President of the RICS.

40.
But as I have already noted, there is no evidence before the court that Twintec agreed who the nominating body for an adjudicator should be.

41.
A further possibility that was raised in argument (at the suggestion of the court) was that Twintec was obliged to comply with all the terms of DOM/2 that concerned the performance of the work or the payment for it. These were described in argument as "primary obligations", as opposed to "secondary obligations" which would concern matters such as indemnities, provisions for insurance, and so on. Whilst this is a superficially attractive solution, I consider that Mr. Reed is probably correct in his submission that it is over complicated and would produce uncertainty.

42.
As with so many things, the simplest solution is often the best. The words "in accordance with" can be given their natural meaning if the LOI is interpreted so as to require Twintec to carry out all the work necessary to achieve the design and construction programmes in a manner that complied with the documents referred to in the LOI and to do so in a manner that did not put it in breach of any of the obligations set out in the DOM/2 conditions. If Twintec were to do that, it would then carry out the work "in accordance with" the documents referred to in the LOI including the DOM/2 conditions.

43.
So in my view what the LOI required was that Twintec would carry out such works as were necessary to achieve the programmes, being work that was compliant with the requirements of the documents identified in the LOI. An obligation to effect insurance or to comply with an indemnity clause would not be an obligation the performance of which was necessary to enable Twintec to achieve the programmes with work that complied with the identified documents. Similarly, there was no obligation on Twintec to give notices of delay: although of course if it failed to do so it would find itself

prejudiced if and when the formal sub-contract was entered into. However, if the DOM/2 conditions specified a particular standard of design or workmanship, then Twintec would have to carry out its work in accordance with that standard.

Summary of my conclusions on the terms of the LOI

44.
I have reached the clear conclusion that the LOI was a simple free-standing contract that would govern the parties' legal relations until a formal sub-contract was entered into.

45.
I conclude also that the formal sub-contract, if made, was to be retrospective in effect. This is why Twintec had to carry out the works "in accordance with" the terms of DOM/2. To this end it would have to do whatever was necessary to ensure that, if the DOM/2 conditions were applied retrospectively, Twintec would not find itself in breach of any of them. In my view, secondary obligations, such as compliance with indemnity clauses, were not incorporated into the LOI, both as a matter of construction and because this was not necessary to give business efficacy to the LOI.

46.
One such secondary obligation was, in my view, the mode of resolution of disputes. It was not necessary to incorporate the DOM/2 provisions (even assuming that the parties had in principle agreed upon the identity of the nominating body) because in their absence the provisions of the Scheme for Construction Contracts would apply by virtue of section 108(5) of The Housing Grants, Construction and Regeneration Act 1996. Under the terms of the Scheme, the default position for the nominating body of an adjudicator is the President of the RICS.

47.
However, for the reasons that I have given at paragraphs 39 and 40 above, even if VFL's case as to the incorporation of the DOM/2 conditions were correct, the nominated adjudicator would not have been validly appointed pursuant to those conditions since there is no evidence that the relevant provision in the Appendix was appropriately amended with the agreement of Twintec.

VFL's alternative case

48.
If VFL is wrong in its submission that the conditions of DOM/2 were incorporated into the LOI, then its alternative case is that the performance of the work by Twintec after 23 October 2007 was subject to the terms of DOM/2. This is based on Twintec's letter of that date, which was described as an "Order Acknowledgement".

49.
This letter opened with the following words:

"We thank you for your valued order that is now receiving our attention and would like to take this opportunity to confirm the details of our quotation and the basis on which we are proceeding with the works."

50.
The letter went on to state the basis on which Twintec was proposing to carry out the work, including the fact that the terms and conditions of the sub-contract would be the DOM/2 standard form of sub-contract as amended by Twintec's quotation. The letter then said:

“Commencement of the works will be deemed acceptance of the terms stated herein.”

51.
I have some difficulty in understanding the purpose of this letter, but it probably does not matter because I am inclined to accept Miss Smith’s submission that it had no effect because the parties had already concluded a binding contract when Twintec returned the signed copy of the LOI. However, there is one difficulty with this submission in that it seems to me to be at least possible that the letter of 23 October 2007 was sent by Twintec at the same time as it returned the signed copy of the LOI. This possibility arises from the fact that the copy of the LOI signed by Twintec has a date stamp of 1 November 2007, suggesting that that was the date of its receipt by VFL. The receipt stamp on the letter of 23 October 2007 is unfortunately not legible, but it looks as if it might bear the same date.

52.
If this is correct (that the signed acceptance of the LOI was returned by Twintec together with its letter of 23 October 2007), then the acceptance of the LOI would have to be read in the context of the letter of 23 October 2007. On its face that letter appears to be a letter whose purpose was to “confirm” the details of Twintec’s quotation, in which case it would not have been intended to add anything to the documents referred to in the LOI. The sentence relating to the commencement of the works is curious. Twintec could not, by starting the work, accept its own offer, which is what the sentence appears to be saying.

53.
It seems to me that the reference to the commencement of the works is simply meaningless, apart from the fact that it clarifies the fact that Twintec has agreed to carry out the work on the terms set out in the letter. But in my view there is nothing in the letter of 23 October 2007 that is inconsistent with the terms of the LOI and a mutual intention to enter into a formal sub-contract at a later date.

54.
For these reasons, I consider that there is nothing in VFL’s alternative case based on the letter of 23 October 2007.

55.
VFL has also referred to a further letter from Twintec dated 31 January 2008. This is the letter which, as I have already mentioned, referred to VFL’s “letter enclosing the sub-contract”. Since there appears to have been no reply by VFL to Twintec’s comments set out in this letter, it is not clear to me how it can take the contractual position any further. It is each party’s primary case that a binding contract was concluded when Twintec returned the signed copy of the LOI, and VFL has expressly pleaded that the parties did not enter into a subsequent formal sub-contract (see paragraph 20(f) of VFL’s Reply). Accordingly, I consider that this letter has no further legal effect. Unless it evidenced the making of a formal sub-contract, a proposition for which neither party contends, then it cannot affect the contract that was concluded by the LOI. At its highest, it appears to represent an offer which was never accepted.

56.
For these reasons I reject this further alternative case also.

The jurisdiction of the adjudicator

57.

The effect of my conclusions about the true meaning and effect of the LOI is that VFL requested the appointment of an adjudicator pursuant to a provision that was not a term of the contract made between the parties.

58.
Mr. Reed submits that it makes no difference because the nominating authority who purported to nominate the adjudicator, the President of the RICS, would have been the nominating authority under the Scheme (the parties not having made any other agreement about the appointment of an adjudicator). In these circumstances Mr. Reed submits that Twintec is seeking to promote form over substance and that its position is entirely artificial. Whilst, at a practical level, I have some sympathy with this submission, I cannot accept it because the validity of the procedure by which the adjudicator was nominated goes to the heart of his jurisdiction.

59.
In support of this last point, Twintec relies on a decision of the Court of Appeal in Pegram Shopfitters v Tally Weijl [2004] 1 WLR 2082. The central issue was the nature of the contractual position of the parties. There were three possibilities: first a contract on the JCT terms; second a contract incorporating the provisions of the Scheme; third, that there was no contract at all. The claimant asserted that the Scheme applied and it had obtained the appointment of an adjudicator under its provisions. Subsequently it received a decision in its favour from the adjudicator. The issue on the appeal was whether or not the adjudicator had been validly appointed. At paragraph 32 of his judgment, May LJ said:

"It seems to me to be at least arguable either that there was a contract here, but upon JCT Prime Cost Terms, or, perhaps more likely, that there was no concluded written construction contract. The judge's recitation of the facts and the analytic contortions evidenced in paragraphs 30 and 31 of his judgment, including his characterisation of the situation as 'a construction contract whose terms cannot readily be ascertained', suggests to me a real possibility that there was no concluded written construction contract. I emphasise that I do not so decide. [Counsel's] submission however, overlooks the fact that the only circumstance in which the adjudicator would clearly have had jurisdiction was if the claimant's contentions as to the contractual terms were correct . I regard this as the least likely of the three possibilities. The fact that adjudication under the Scheme and adjudication under a JCT Prime Cost Contract would be similar procedures does not overcome the twin difficulties that Mr. Morris was appointed under the Scheme, and that a sufficiently secure identification of the contractual terms was intrinsically necessary to the proper performance of his adjudication task."

(My emphasis)

60.
In my view it is clear from the passage underlined that May LJ took the view that unless the adjudicator was appointed under the correct contractual provisions, his appointment would be a nullity. With this I respectfully agree. The jurisdiction of the adjudicator derives from the agreement of the parties, as reflected by the terms of the contract they have entered into. An adjudicator cannot be validly appointed under a contractual provision that does not in fact exist. He or she would have no jurisdiction to take up appointment and, in consequence, any decision that he or she might make would not be capable of enforcement.

61.
Whilst it was clearly the intention of Parliament that every party to a construction contract should have the right to resolve its disputes by adjudication at any time, there is no provision that a dispute

can be validly resolved by an adjudicator other than one appointed in accordance with the terms of the contract (or the Scheme, if it is incorporated into the contract either expressly or by operation of law).

62.
Mr. Reed submits that in spite of this the adjudication should proceed because the appropriate time for the court to intervene is that the enforcement stage. He submitted that to stop the adjudication in its tracks would be to frustrate the intention of Parliament.

63.
I do not accept this submission. By section 37 of the Senior Courts Act 1981, the court may grant an injunction in all cases in which it appears to the court to be just and convenient to do so. In Mentmore Towers Ltd v Packman Lucas Ltd [2010] EWHC 457 (TCC), I held that the court had jurisdiction to restrain the pursuit of an adjudication under section 37, and neither party has challenged that conclusion. I am unable to see how it would be either just or convenient to permit an adjudication to continue in circumstances where the decision of the adjudicator will be incapable of enforcement. In the present case if the adjudication went ahead and the adjudicator purported to give a decision in Twintec's favour, that decision would not be binding on VFL. Precisely the same issue would still have to be resolved in the litigation. Accordingly a victory by Twintec in the adjudication would be one that would make no difference to its legal rights. On the contrary, Twintec would have diverted valuable resources in order to deal with the issues in the adjudication and to incur substantial irrecoverable expenditure in doing so.

64.
Conversely, a purported decision in VFL's favour would be unenforceable and would, in itself, achieve nothing. It is true that a well-reasoned decision by an adjudicator might encourage the parties to settle their dispute, but that, it seems to me, is a fairly nebulous advantage. I cannot see how it outweighs the significant and otherwise unproductive expenditure of money and resources by both parties that the adjudication will involve.

65.
The court has been informed that, since the hearing of this application, VFL has undertaken not to pursue any other adjudication in relation to the current dispute in the event that I decide the issue of the adjudicator's jurisdiction against it. This, it seems to me, is a very realistic position for it to take.

66.
Although an injunction to restrain the pursuit of a referral to adjudication is a step that should be taken only in exceptional circumstances (as I discuss later in this judgment), I consider that this is such a case. Accordingly, I propose to make an order restraining VFL from pursuing this adjudication any further.

Is a referral to adjudication oppressive and unreasonable?

67.
Since I have already determined the jurisdiction issue in Twintec's favour, I propose to deal with this aspect fairly shortly.

68.
In Mentmore Towers v Packman Lucas [2010] , I said, at paragraph 22:

“My conclusion is that there is no difference in principle between the approach to be adopted by the court when considering whether or not to order a claim brought by way of litigation to be stayed on the grounds that it is being brought unreasonably and oppressively, and the approach to be adopted when considering whether or not to restrain the further pursuit of an identical claim by way of adjudication on the same grounds. However, the application of those principles may differ according to the circumstances. It does not follow that because a court would order the stay of a particular claim brought by litigation, that it would automatically restrain the pursuit of the same claim by way of adjudication.”

The issue here, therefore, is whether this referral to adjudication has been brought unreasonably and oppressively. I should emphasise that these two requirements are disjunctive. A referral to adjudication may be unreasonable (for example, if deliberately delayed until shortly before Christmas) without necessarily being oppressive. Alternatively, it may prove to be oppressive - perhaps because, unknown to the referring party, the relevant personnel within the responding party have just been posted abroad - without having been unreasonably started. Both elements must be present and, in my judgment, to a fairly high degree.

69.
It is therefore convenient to take Twintec’s first three supplementary grounds set out at paragraph 3 above together because this test is applicable to each of them. In my view the starting point must be the statutory right to refer a dispute to adjudication “at any time” pursuant to section 108 of the Housing Grants, Construction and Regeneration Act 1996. In this context, the authorities support the following propositions:

i)
The fact that a referral to adjudication is brought in parallel with existing litigation raising the same issue is not in itself a ground for restraining the referral: see Herschell Engineering v Breen Property [2000] BLR 272.

ii)
The mischief at which the 1996 Act is aimed is the delays in achieving finality in arbitration or litigation: see Herschell, at paragraph 20.

iii)
The right to refer a dispute to adjudication at any time confers a commercial advantage on the referring party and this must be taken to have been known by Parliament when the 1996 Act was passed: see London Borough of Camden v Makers [2009] EWHC 605 (TCC), at paragraph 32. One aspect of this advantage is the fact that the responding party will in most cases incur irrecoverable costs in defending the adjudication, and this can operate as a bargaining lever in favour of the referring party.

iv)
A party should not be prevented from pursuing its right to refer a dispute to adjudication save in the most exceptional circumstances see Makers, at paragraph 35.

70.
Having regard to the nominated adjudicator’s unavailability to deal with the referral over the Christmas break, I am not persuaded that the inevitable strains on Twintec’s resources that would be imposed by the adjudication can be described as both unreasonable and oppressive. It has to be remembered that the conduct that must be condemned as unreasonable - the referral of a dispute to

adjudication - is conduct that has been sanctioned by Parliament. That is why the facts of the particular case must be exceptional before the court would be justified in concluding that a referral of a dispute to adjudication is unreasonable, even though it may be oppressive. Parliament has in effect expressly approved a party's right to start an adjudication in circumstances that can effectively amount to an ambush of the responding party. That, of itself, does not justify the interference of the court.

71.
In saying this I do not underestimate the difficulties in which Twintec and its experts have been placed by VFL's decision to refer this dispute to adjudication at this particular juncture. Undoubtedly, if the referral were to proceed it would put Twintec and its advisers under great pressure, but in my judgment that pressure is not of itself sufficient to amount to an exceptional circumstance so as to justify the court in restraining VFL from further pursuit of the referral. It has not been said that Twintec will be prevented from meeting its deadlines in the litigation, although Mr. Trees says - I have no doubt with justification - that it will be very difficult for it to do so. Twintec's main complaint is about the additional costs, duplication and use of resources that defending the proposed adjudication would involve. However this, in my view, is a burden that parties to a construction contract sometimes have to accept.

72.
In support of its submissions in relation to unreasonable and oppressive conduct, Twintec cited a number of cases involving applications for anti-suit injunctions. The citation of these authorities was in part directed to the ground which Twintec now no longer pursues, namely the allegation that the referral to adjudication was made for a collateral purpose. But in any event I did not find these cases to be of much assistance in resolving the issues that arise on this application since they concerned litigation in different jurisdictions which, if allowed to proceed, would be binding on some of the parties. Since this application involves an adjudication, that is not the position here and so I do not propose to say any more about those cases.

73.
For these reasons, I reject Twintec's first three supplementary grounds.

Can VFL recover the costs of the tests by way of damages?

74.
Twintec's fourth supplementary ground for seeking an injunction is that the adjudication has no real prospect of success. This is because, Twintec submits, the sum that VFL is seeking to recover in the adjudication is a sum that it has incurred by way of legal costs and is therefore not recoverable as damages.

75.
Twintec submits that the referral is an attempt to circumvent the costs aspect of the court's management of this case. It says, correctly, that the court carefully considered the liability for the costs of the tests which it had ordered in November 2013 and refused to shift them from the party that chose to incur them prior to the determination of the claim. Twintec submits that the adjudication is an attempt to get round this. It says that VFL is claiming by way of damages a sum that is in truth part of the costs of the litigation and that an order to pay these is one that can only be made by the court.

76.

In my view this submission is misconceived. At the November hearing GJ 3 was seeking an order that the costs of the further tests that had been directed by the court should be funded by the parties jointly pending the final determination of the claim. The court's refusal to make such an order was, in part, based on the premise that it had no jurisdiction to order a party to pay costs in the absence of an "event" or conduct that would justify an order for such costs. The question of whether the costs of the tests could also be recovered as damages was not one that the court was asked to determine at that hearing.

77.
Twintec submits further that it would not be right that the adjudicator should determine the question of whether Twintec should pay for the costs of the tests when there are several other parties who might also be held liable to pay these costs. It is said that this is a fragmentation of the issues in the litigation.

78.
I disagree. A party is entitled to sue whoever it wishes in relation to a particular loss notwithstanding the fact that more than one party may be liable for either the whole or any part of that loss. It is for the party sued to protect itself by starting the appropriate contribution proceedings against any other party that may also be liable. In this case, such contribution proceedings are already on foot.

79.
Twintec's real point is that the costs of the tests claimed are to be regarded as a disbursement that is only recoverable as a cost in the litigation. It is submitted that it is not a cost that is recoverable as damages.

80.
At paragraph 72 of its first skeleton argument, Twintec made the following submission:

"VFL itself states in its letter of claim that VFL has had to undertake investigation works as a 'reasonable and proportionate response given that VFL was faced with claims from' Accolade and the Landlord. In paragraph 11.4 of the Referral, VFL says that by necessity it incurred costs 'to determine whether Twintec's defectively constructed slab was in fact capable of achieving the design loads to assist in the defence of accusations made against it by Accolade and GLD'. It is clear that the test costs (1) were incurred for VFL's own purposes to defend itself against claims against it and (2) were used to prepare the claim is now brings against Twintec."

81.
VFL's case is that Twintec's breach of contract has caused it loss, namely its liability to Accolade for, amongst other things, the costs of reasonable repairs to the floor. In my view, tests to determine the condition of the floor may be required for one or both of two reasons. First, to establish the nature of the defect and to enable and inform an assessment of the nature and extent of the necessary remedial work. Second, to establish whether VFL is or is not liable for the defect (which may depend on what the tests show it to be).

82.
In the former case it seems clear to me that the costs of the appropriate tests would form part of the loss sustained by VFL as a result of Twintec's breach of contract (if proved), just as would the costs of the remedial works that the tests showed to be necessary.

83.

At paragraph 78 of its initial skeleton argument, Twintec submits that:

“The test results are being used to defend one claim and bring another, and were incurred in the midst of pre-action correspondence and the issuing of claims. These were expenses and fees of the proceedings against VFL and incidental to the VFL proceedings against Twintec. They are properly to be characterised as costs and to date, all parties appear to have proceeded on the basis that this is the correct characterisation.”

The last sentence of this passage is not entirely accurate, because VFL has in fact claimed the test costs as damages in its proceedings against Twintec.

84.
In my view this submission is a circular argument. It is a bit like giving a tin a particular label, in this case “costs”, and then saying - because the label says “costs” - that is what must be in the tin.

85.
In my opinion it is at least reasonably arguable that the costs of the load tests for which VFL has paid have been incurred as part of the losses caused by Twintec’s alleged breach of contract. It may be that some or all of those tests could also be recovered as disbursements incurred in the course of or incidental to the litigation because, as Twintec has pointed out, they were all incurred after Accolade’s letter of claim to VFL which was sent on 9 February 2012.

86.
But the fact remains that if an employer alleges that a contractor has carried out defective work, being work which was in fact carried out by a sub-contractor, the contractor will be liable (if the allegation is well founded) for the reasonable cost of any necessary remedial work. If it is necessary to carry out tests in order to establish precisely what remedial work is required, then in my view the costs of such tests are just as much a part of the contractor’s loss as the costs of the remedial work itself. It may be that the same tests would have had to be carried out by the contractor in any event in order to establish whether what the employer alleged was true, but the fact that the same expenditure can be characterised in another way does not, in my judgment, prevent it being a recoverable head of damage in any claim against the sub-contractor.

87.
I therefore reject Twintec’s submission that VFL’s claim in the adjudication is bound to fail. In my view, VFL’s claim that it is entitled to recover the costs of the tests as damages is at least reasonably arguable.

Conclusion

88.
For the reasons that I have given, I consider that VFL has no prospects of showing that the adjudicator was validly appointed under a relevant contractual provision. VFL applied for the appointment of an adjudicator to the President of the RICS, purportedly pursuant to the terms of the DOM/2 form of sub-contract. In my judgment the conditions of the DOM/2 form of sub-contract were not incorporated as a whole into the LOI. VFL has been unable to show that Twintec otherwise agreed to the identity of the nominating body. Further, on the material before the court there is no suggestion that VFL would be able to produce such evidence in the future.

89.

If it is clear that an adjudicator’s appointment is invalid it follows, absent any agreement of the parties to the contrary, that any decision that he or she makes will be a nullity. In my view, no useful purpose would be served by allowing an adjudication to proceed in these circumstances. This is therefore an exceptional case in which the court is justified in granting an injunction at this stage to restrain the referral to adjudication from proceeding further. Accordingly, that is the relief that I propose to grant. I will leave counsel to agree the precise terms of the order. I understand that the parties have reached agreement as to the costs of this application.