

Neutral Citation Number: [2015] EWHC 587 (TCC)

Claim No. A40BS409

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BRISTOL DISTRICT REGISTRY

TECHNOLOGY AND CONSTRUCTION COURT

Date: 11 March 2015

Before:

HIS HONOUR JUDGE HAVELOCK-ALLAN QC

Between:

ECOVISION SYSTEMS LIMITED

Claimant

- and -

VINCI CONSTRUCTION UK LIMITED

Defendant

Andrew Kearney (instructed by **RPC**) appeared for the claimant

Mark Smith (instructed by **Systech Solicitors**) appeared for the defendant

JUDGMENT

HIS HONOUR JUDGE HAVELOCK-ALLAN Q.C.

1. By this Part 8 claim the claimant ("Ecovision") seeks a declaration that the decision of an adjudicator, Mr Jensen, is of no effect and that Ecovision is not obliged to comply with it.

2. It is common ground that Mr Jensen was appointed to resolve a dispute arising under a construction contract, as defined in s. 104(1) of the Housing Grants, Construction and Regeneration Act 1996 (the "HGCRA"). Ecovision's complaint is that neither the defendant ("Vinci"), who requested adjudication, nor Mr Jensen, until the adjudication process had largely run its course, would say under which of 3 possible sets of terms the adjudication had been instituted. Vinci says that this does not matter. Ecovision says that identification of the terms under which Mr Jensen was appointed and under which he purported to act goes to the heart of his jurisdiction.

3. Vinci is a building contractor who, on or about 8 December 2010, entered into a sub-contract with Ecovision under which Ecovision agreed to carry out the design, supply and installation of a ground source heating and cooling system for an office development called Vanguard House on the Daresbury Science and Innovation Campus in Cheshire ("the Sub-Contract"). Vinci was the main contractor for the development under a contract with the Northwest Development Agency dated 19 February 2010 ("the Main Contract"). Vanguard House was referred to in the main contract documentation as "Daresbury Building 3".

The contract terms

4. The Main Contract was based upon the NEC3 Engineering and Construction Contract (June 2005 with amendments in June 2006) and incorporated the Main Option C clauses of that contract form (Target contract with Activity Schedule), all as amended by the Northwest Development Agency (“the employer”).

5. The Sub-Contract was based upon the corresponding NEC3 Engineering and Construction Sub-Contract and 16 Appendices. So far as is relevant, Part One of the Sub-Contract Data in the NEC3 Sub-Contract form (“Data provided by the Contractor”) was filled in by Vinci so that it read as follows (the manuscript insertions in the printed form are reproduced here with underlining):

“1. General

- The conditions of contract are the core clauses and the clauses for main Option A, dispute resolution Option ... and secondary Options X7, X16, X 17 and Y (UK) 2 of the NEC2 Engineering and Construction Subcontract June 2005 (with amendments June 2006). All as amended by the numbered documents in Appendix 1 annexed hereto.

...

- The Adjudicator in this subcontract is
Name: The President of the Royal Institute of Chartered Surveyors

...

- The Adjudicator nominating body is
As Appendix 6 annexed hereto

...

9. Options statements

- If Option Z is used

The additional conditions of subcontract are All as detailed in the numbered documents in Appendix 1 annexed hereto.”

6. The only standard core clauses of the NEC3 Sub-Contract Form which featured in argument are:

“10.1 The Contractor and the Subcontractor shall act as stated in this subcontract and in a spirit of mutual trust and co-operation.

11.1 In these conditions of subcontract, terms identified in the Subcontract data are in italics and defined terms have capital initials.”

7. Main Option A incorporated the clauses for a “Priced subcontract with activity schedule”. None of these clauses matters for present purposes.

8. Where (as here) the Sub-Contract is governed by the HGCRA, the dispute resolution Option in the NEC3 Sub-Contract Form is Option W2. Option W2, so far as is material, provides:

“W2.2

...

(3) If the Adjudicator is not identified in the Subcontract Data or if the Adjudicator resigns or becomes unable to act

- the Parties may choose an adjudicator jointly or
- a Party may ask the Adjudicator nominating body to choose an adjudicator

The Adjudicator nominating body chooses an adjudicator within four days of the request. The chosen adjudicator becomes the Adjudicator.

...

W2.3

(1) Before a Party refers a dispute to the Adjudicator, he gives notice of adjudication to the other Party with a brief description of the dispute and the decision which he wishes the Adjudicator to make. If the Adjudicator is named in the subcontract data, the Party sends a copy of the notice of adjudication to the Adjudicator when it is issued. Within three days of the receipt of the notice of adjudication, the Adjudicator notifies the Parties

- that he is able to decide the dispute in accordance with the subcontract or
- that he is unable to decide the dispute and has resigned.

If the Adjudicator does not so notify within three days of the issue of the notice of adjudication, either Party may act as if he has resigned.

(2) Within seven days of a Party giving notice of adjudication he

- refers the dispute to the Adjudicator,
- provides the Adjudicator with the information on which he relies, including any supporting documents and
- provides a copy of the information and supporting documents he has provided to the Adjudicator to the other Party.

Any further information from a Party to be considered by the Adjudicator is provided within 14 days of the referral. This period may be extended if the Adjudicator and the Parties agree.

...

(4) the Adjudicator may

- review and revise any action or inaction of the Contractor related to the dispute and alter a quotation which has been treated as having been accepted,
- take the initiative in ascertaining the facts and the law related to the dispute,
- instruct a Party to provide further information related to the dispute within a stated time and
- instruct a Party to take any other action which he considers necessary to reach his decision and to do so within a stated time.

...

(8) The Adjudicator decides the dispute and notifies the Parties of his decision and his reasons within twenty-eight days of the dispute being referred to him. This period may be extended by up to fourteen days with the consent of the referring Party or by any other period agreed by the Parties.

...

(10) If the Adjudicator does not make his decision and notify it to the Parties within the time provided by this subcontract, the Parties and the Adjudicator may agree to extend the period for making his decision. If they do not agree to an extension, either Party may act as if the adjudicator has resigned.”

9. Secondary Option Y(UK)2 in the NEC3 form provides definitions drawn from the HGCRA. For present purposes, the only relevant clause in Option Y(UK)2 is clause Y2.1(2) which provides that: “A period of time stated in days is a period calculated in accordance with Section 116 of the Act”.

10. It is common ground that Secondary Option Z was used. Option Z covers “Additional Conditions of subcontract”. Clause Z1.1 provides that: “The additional conditions of subcontract stated in the Sub-Contract Data are part of this contract”. The insertion in manuscript of the words: “All as detailed in the numbered documents in Appendix 1 annexed hereto” under Option Z in the Sub-Contract Data had the consequence that all the terms in the numbered documents in Appendix 1 were incorporated into and became part of the Sub-Contract. The numbered documents in Appendix 1 were stated as comprising, amongst others, “The Description of Works”. The Description of Works was in turn defined as consisting of: (1) Preliminaries Pages as per Document A annexed to Appendix 1 (2) Preambles/Specification pages as per Document B annexed to Appendix 1, (3) The Bills of Quantities/The Schedule of Rates/Prices pages as per Document C annexed to Appendix 1 and (4) Details of Performance Specified Work. Document A contained pages 1- 50 of the Main Contract. Thus Option Z, via Appendix 1 and Document A, had the effect of incorporating pages 1-50 of the Main Contract into the Sub-Contract.

11. Pages 1-50 of the Main Contract included the following clauses which have a bearing on the issues raised by the present claim: (1) Dispute Resolution Option W2 and (2) clause Z16 of the Schedule of Amendments to the Main Contract. The wording of Option W2 in the Main Contract was the same as the wording of Option W2 in the Sub-Contract. However Option W2 in the Main Contract was amended by clause Z16 as follows:

“DISPUTE RESOLUTION PROCEDURE

Z16.1 Delete main option clauses W2.1, W2.2, W2.3 and W2.4.

Z16.2 Insert the new main option clauses as follows:

“W2.1 The proper law of this contract is English law. The courts of England have jurisdiction in relation to this contract, and a court or judge thereof has jurisdiction to open up review and revise any decision or opinion or certificate under the contract.

W2.2 Where pursuant to this contract or Part II of the Housing Grants, Construction and Regeneration Act 1996 a dispute or difference is referred to adjudication, that adjudication is governed by

and conducted in accordance with the Adjudication Rules of the Technology and Construction Solicitors Association, which are incorporated herein by reference. The decision of the adjudicator is binding on the parties until the dispute or difference is finally determined by a court or judge thereof.

W2.3 Any reference in the contract to arbitration or to an arbitrator is deleted and substituted with a reference to the English courts or a judge thereof.” ”

12. Of the other Appendices to the Sub-Contract, Appendix 2 and Appendix 6 are relevant.

13. Appendix 2, entitled “Amendments and Additions to the Subcontract Conditions”, contained a clause to be inserted into the section of the core clauses of the Sub-Contract headed “Interpretation and the law” which stated:

“12.5 “If any conflict appears between the Numbered Documents listed in the Subcontract Data and the balance of the Subcontract Data, then the balance of the Subcontract Data shall prevail. If any conflict appears between the terms of the Conditions of Subcontract and the Numbered Documents, the Numbered Documents (but excluding any standard printed Conditions of the Subcontractor) shall prevail. If any conflict appears between the provisions of the Main Contract and the terms of the Subcontract, the terms of the Subcontract prevail.

14. Appendix 2 also introduced the following new clauses into the section of the core clauses of the Sub-Contract entitled “The Subcontractor’s main responsibilities”:

“20A.1 The Subcontractor shall be deemed to have full knowledge of the provisions of the main contract (other than details of the rates and prices) and other contracts made by the Contractor in connection with the main contract Works and the Contractor shall, if so requested, make available a copy of the main contract and other contracts for inspection by the Subcontractor.

20A.2 Save where the provisions of the Subcontract otherwise provide the Subcontractor shall carry out, complete and maintain the subcontract works and shall observe, perform and comply with all the obligations and liabilities of the Contractor under the main contract and other contracts made by the Contractor in connection with the main contract works insofar as they relate to the subcontract works. Nothing herein shall be construed as creating any privity of contract between the Subcontractor and the Employer.”

15. Appendix 6 (referred to in the Sub-Contract Data as identifying the Adjudicator Nominating Body or “ANB”) did not in fact specify an ANB. Instead it provided in Special Condition 7 that:

“The Adjudicator referred to in the Sub-Contract shall be the President (or if he is unable to act, any Vice-President) of the Royal Institution of Chartered Surveyors.”

16. So the Sub-Contract contained 3 sets of terms under which, potentially, either party could request adjudication: (1) Option W2 of the Sub-Contract, (2) Option W2 of the Main Contract as amended by clause Z16, incorporated into the Sub-Contract by Appendix 1 and Document A, or (3) if neither of the first two was operable or applicable, the Scheme in Part I of the Schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998 (1998 S.I. No. 649)(“the Scheme”). I shall refer to them as “the candidate rules”

17. The procedure in each of the candidate rules is not identical. Whilst there are similarities (in particular to comply with s. 108), there are differences. The following summary illustrates how the main provisions in each set of rules would apply to the subject dispute:

Option W2 of the Sub-Contract

Adjudicator: The President of the RICS (Sub-Contract Data).

ANB: possibly any Vice-President of the RICS or anyone nominated by the President of the RICS (Appendix 6)

ANB must choose the adjudicator within 4 days of the request if the named adjudicator is unable to act (W2.2(3)).

The adjudicator must notify the parties whether he is able to act within 3 days of issue of the notice of adjudication (W2.3(1)).

The party giving notice of adjudication must refer the dispute to the adjudicator and provide information on which he relies and supporting documentation to adjudicator and other party within 7 days of the notice (W2.3(2)).

Any further information from a party must be provided to the adjudicator within 14 days of the referral unless the adjudicator and the parties agree an extension (W2.3(2)).

The adjudicator may instruct a party to provide further information within a stated time or instruct a party to take any other action which he considers necessary to reach his decision, and to do so within a stated time (W2.3(4)).

The adjudicator's decision must be made and notified to the parties within 28 days of the referral (W2.3(8)).

The 28 day period may be extended by up to 14 days with the consent of the referring party or by any other period if both the parties agree (W2.3(8)).

If the adjudicator does not make his decision and notify it to the parties within the 28 days or such extended period as may already have been agreed, the parties and the adjudicator may agree to extend the period for the making of the decision, failing which either party may act as if the adjudicator has resigned (W2.3(10)).

The adjudicator's decision is binding and enforceable as a matter of contractual obligation. The decision is final and binding if neither Party has notified the other within the times required by this contract that he is dissatisfied and intends to refer the matter to the tribunal (W2.3(11)).

The dispute may not be referred by a party to the tribunal unless it has first been decided by the adjudicator (W2.4(1)) and that party has notified the other party of his dissatisfaction with the decision of the adjudicator within 4 weeks of notification of the decision (W2.4(2)).

Option W2 of the Main Contract as amended by clause Z16

Adjudicator: Not expressly identified (unless identified by one of the rival versions of Option W2).

ANB: The Chairman of TeCSA (TeCSA Rule 5).

If the parties agree upon the adjudicator and he confirms he is willing to act within 5 days of the notice of adjudication, that person shall be the adjudicator (TeCSA Rule 4).

Where there is no agreement on the identity of the adjudicator or he has not confirmed his willingness to act, any party shall no later than 2 days after receipt of the notice of adjudication by the other party apply to the Chairman of TeCSA to make a nomination and the Chairman shall make an appointment within 5 days (TeCSA Rule 5).

Within 7 days of the notice of adjudication, the adjudicator shall give written notice of acceptance of the appointment and the referring party shall serve the referral notice (TeCSA Rule 6).

The date of the referral shall be the date the referral notice is received by the adjudicator (TeCSA Rule 7).

The adjudicator may decide upon his own substantive jurisdiction and as to the scope of the adjudication (TeCSA Rule 12).

Unless the parties agree that any decisions of the adjudicator shall be final and binding, they shall be binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement (TeCSA Rule 15).

The adjudicator shall establish the procedure and timetable for the adjudication (TeCSA Rule 17).

Without prejudice to the generality of Rule 17, the adjudicator may (amongst other things) require any party to produce a bundle of key documents, or require the delivery to him of copies of any documents that are not privileged (TeCSA Rule 18).

The adjudicator shall reach his decision within 28 days after receipt by him of the referral notice or such longer period as is agreed by the parties after the referral. The adjudicator can extend the 28 day period by up to 14 days with the consent of the referring party (TeCSA Rule 21).

The Scheme

Adjudicator/ANB: Not expressly identified unless identified by one of the rival versions of Option W2.

In the absence of a named adjudicator or ANB, the referring party shall request an ANB to select a person to act as adjudicator (paragraph 2(1)(c)).

The ANB must communicate the selection of an adjudicator within 5 days of receiving the request to do so (paragraph 5(1)).

The person requested to act as adjudicator, or nominated by the ANB, must indicate whether or not he is willing to act within 2 days of receiving the request (paragraph 2(2) and paragraph 5(3)).

If the adjudicator named in the contract or nominated by the ANB is unable to act or does not respond, the party requesting adjudication may ask the ANB or any other ANB to select another person as adjudicator (paragraph 6(1)(c)).

The referral notice and supporting documentation must be sent to the adjudicator no later than 7 days from the date of the notice of adjudication (paragraph 7(1)).

The adjudicator shall decide on the procedure to be followed in the adjudication and may request any party to the contract to supply him with such documents as he may reasonably require, obtain and consider such representations and submissions as he requires and give directions as to the timetable and any deadlines (paragraph 13).

The adjudicator shall reach his decision no later than: (a) 28 days after the date of the referral notice or (b) 42 days after the date of the referral notice if the referring party consents, or (c) such period exceeding 28 days after the referral notice as the parties may agree (paragraph 19(1)).

The adjudicator shall deliver a copy of his decision to the parties as soon as possible after he has reached his decision (paragraph 19(3)).

The decision of the adjudicator is binding on the parties until the dispute is finally determined by legal proceedings, by arbitration or by agreement (paragraph 23(2)).

The dispute

18. Ecovision completed the Sub-Contract works in or around March 2011. Following an operational failure of the ground source heating and cooling system at Vanguard House in December 2012, a dispute arose between Vinci and Ecovision as to the adequacy of the design of the system. Vinci alleged that the design was defective in several respects, in particular that it was not capable of cooling the building to the required standard. Ecovision denied liability.

19. In June 2014, Vinci resolved to refer the issue of liability (but not valuation and payment) to adjudication.

Chronology of the adjudication

20. On 11 June, Vinci's solicitors ("Systech") served a Notice of Adjudication on Ecovision and said they would be applying to "the adjudicator(s) named in the contract and, if unsuccessful ... to an adjudicator nominating body for the nomination of an adjudicator". What Systech did the same day was to inquire whether the President or any Vice-President of the RICS was free to act and, on being told that they were not, to file a request for the nomination of an adjudicator with the Dispute Resolution Service of the RICS. The request was in Form DRS2C. In Form DRS2C, there is a box for the following question to be answered: "Is this application made

under the Scheme or Contract?”. Vinci left the answer blank. The RICS nominated Mr Jensen on Monday, 16 June.

21. Mr Jensen wrote at once to Vinci’s solicitors and to Ecovision confirming acceptance of his appointment. His letter of 16 June contained “initial directions for the conduct of the adjudication” which were stated to be given “Subject to any provisions there may be in the contract”. The initial directions required Vinci to serve the Referral Notice and all supporting documentation within 7 days of the Notice of Adjudication and Ecovision to serve its Response and supporting documentation within 7 days of receipt of the Referral Notice.

22. The Referral Notice was served on Mr Jensen on 18 June. He confirmed receipt of it the same day and told both parties that his decision was due by 16 July.

23. On 20 June, RPC wrote to Systech asking them to clarify: “(a) the source of your client’s right to adjudicate and (b) pursuant to what adjudication procedure”. Systech replied on 23 June suggesting that if Ecovision wanted to make representations in that regard, they should be made to the adjudicator. Accordingly, RPC wrote to Mr Jensen on 23 June making a formal challenge to Mr Jensen’s jurisdiction. The letter said that Ecovision had not seen a copy of Vinci’s request to the RICS for the nomination of an adjudicator and so did not know under what power Mr Jensen had been appointed. RPC said that the Notice of Adjudication and the Referral were silent on the point. The letter continued:

“In the absence of this information, we are unable to accept that any dispute has been properly notified or referred, unable to accept that you have jurisdiction and we do not see how you can in any event conduct an adjudication when, as far as we are aware, you have not been told what your powers to do so are said to be.”

24. Mr Jensen responded by pointing out that the Sub-Contract was on the NEC3 Form and that in the NEC3 form adjudication was normally covered by Option W2. He went on to say, however, that: “In this contract certain of those clauses have been replaced by Z clauses ...”. He enclosed a copy of the Z clauses from the documents in the referral file (reproduced in paragraph 11 above) and concluded by saying: “If this

does not answer the Respondent's [Ecovision's] query in total then the Respondent should let me know".

25. Still on 23 June, RPC replied to Mr Jensen that, whilst they appreciated that he was trying to assist, it was for Vinci to state its position. RPC asked Vinci to provide a copy of the Form DRS2C by which it had requested the nomination from the RICS. In the same letter, RPC asked Mr Jensen to supply a copy of his nomination. RPC concluded by saying that the only further assistance Mr Jensen could give at this stage was to direct Vinci to clarify the procedure under which it had purported to give the Notice of Adjudication and to provide a copy of the request for the nomination.

26. The last communication exchanged on 23 June was from Systech. Systech referred to paragraphs 25 to 27 of the Referral. These appeared in the section headed "The Contractual Adjudication Provisions" (paragraphs 25-28). Paragraphs 25-27 described how Mr Jensen came to be appointed. Vinci conceded that Special Condition 7 of Appendix 6 of the Sub-Contract Data (see paragraph 15 above) did not identify an ANB: it simply named the President of the RICS, or any Vice-President if he was unable to act, as the adjudicator. Vinci had therefore approached the President's Office requesting him, or any Vice-President, to act. Vinci had been told by the President's Affairs Team that neither the President nor any of the Vice-Presidents was available. The Referral said:

"In the circumstances, Vinci was free to approach an adjudicator nominating body of its choosing and it is a matter of record that Vinci subsequently approached the RICS and asked the Dispute Resolution Service to nominate an adjudicator."

27. Thus, in choosing the RICS as ANB, Vinci was implying that it had relied on paragraph 6(1)(c) of the Scheme. Paragraphs 25 to 28 of the Referral said nothing else about the rules which governed the adjudication. However, elsewhere, in the section of the Referral entitled "Relevant Contractual Terms" (paragraphs 37-85), Vinci acknowledged that Option Z, via Appendix 1 and Document A, had the effect of incorporating clauses from the Main Contract into the Sub-Contract. Although specific mention was only made of clause Z3 and clause Z6, Vinci appeared to be

accepting that by virtue of clause Z16, the amended version of Option W2 was part of the Sub-Contract also.

28. RPC treated the explanation in Systech's letter as inadequate. On 24 June RPC wrote again to Systech demanding answers to 5 questions, one of which was: "Please explain which adjudication procedure your client considers applies: W2, the Scheme, TeCSA or something else". Systech's response was to suggest that if Ecovision had an objection to Mr Jensen's jurisdiction it should make a submission to that effect. Mr Jensen agreed. So RPC wrote a 4 page letter to Mr Jensen on 24 June setting out its position. The letter did not say what Ecovision believed to be the foundation of Mr Jensen's jurisdiction if any. It simply canvassed the possible alternatives (Option W2, Option W2 as amended by clause Z16 i.e. TeCSA Rules, or the Scheme). The letter referred to the judgments of May LJ in *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2003] EWCA Civ 1750, 91 ConLR 173 and Edwards-Stuart J in *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10 (TCC) and pointed out that the jurisdiction of any purported adjudicator has to be assessed against the applicable appointment mechanism because "the validity of the procedure by which the adjudicator was appointed goes to the heart of his jurisdiction" (Edwards-Stuart J in *Twintec* at para. 58).

29. RPC's long letter of 24 June concluded by saying that if the initial direction given by Mr Jensen on 16 June was valid (which RPC made clear was disputed), Ecovision was not going to be able to serve a Response to the Referral Notice by the following day (which was day 7).

30. On 25 June, Mr Jensen wrote two letters to the parties. The first was addressed to RPC. The second was addressed to Systech. He asked Systech whether Vinci was prepared to agree to extending the time for his Decision by 7 days "still leaving the 14 days within the "gift" of the Claimant intact". This was a proposal that the nominal 28 day period should be extended to 35 days by consent of both parties, whilst preserving the possibility of a further 14 days extension by consent of the referring party. The proposal was neutral as to the basis of his jurisdiction because it was consistent with section 108(2)(c) and (d) of the HGCRA and all 3 of the candidate rules. Vinci

immediately agreed to the extension. Ecovision's agreement did not come until the following day and was heavily qualified:

"If and insofar as there is an adjudication validly on foot, and if and in so far as a valid direction has been given requiring a response within 7 days (which we deny) then we [RPC] agree that our client should have at least 14 days for response on the terms proposed."

31. Mr Jensen's letter to RPC of 25 June took Ecovision to task for having addressed the challenge to his jurisdiction in the letter of 20 June to Systech rather than to him, and for not having asked him to investigate his jurisdiction when writing to him on 23 June. Mr Jensen said that he had not directed Vinci to disclose a copy of the Form DRS2C because he did not think he had power to do so. He pointed out that even in their long letter of 24 June, RPC had not asked him to do anything about the objection to his jurisdiction. They had simply asked for more time to serve Ecovision's Response.

32. The letter provoked RPC to reply on 25 June with a direct question to Mr Jensen: "what procedural rules are you applying?". He answered on 26 June as follows:

"In making any decision in the adjudication whether it be the final Decision or a decision as to the procedure, I am entitled to the assistance of both parties. The Claimant has made relevant submissions relying upon its Referral, and now it is for you, if you so wish, to make submissions as to the procedural rules which you consider I should apply. Upon receiving your submissions I will then decide what rules I am applying."

33. RPC insisted that it was for Vinci to provide the clarification. They wrote back to Mr Jensen on 26 June saying:

"... As we have stated before, we have no idea whether the referring party commenced the adjudication under W2, TeCSA, the Scheme or some other set of adjudication rules. It is incumbent on the referring party to be clear on this issue. It is not for us to second-guess the rules of the adjudication. ..."

RPC then came to the nub of the point when they asked rhetorically:

“If you do not presently know which rules apply, how do you know that we are not already contractually entitled (under W2) to 14 days for response?”

34. In the light of these exchanges, Mr Jensen gave directions on 27 June that: (1) the period for service of the Response was extended to 2 July, and (2) the period for the making of his decision was extended to 23 July, still leaving the 14 days within the “gift” of Vinci intact. On 30 June, he answered RPC’s direct question (“what procedural rules are you applying?”) by saying that he was proceeding under Option W2 of the Sub-Contract. In his letter, Mr Jensen went on to say that he did not believe that he had power to require Vinci to commit to a position on the basis of his jurisdiction but invited submissions from Ecovision if it thought otherwise. The same day he disclosed a copy of the Form DRS2C to Ecovision. This revealed that, when it had applied to the RICS for the nomination of an adjudicator, Vinci had not stated whether the application was being made under the Scheme or under contract.

35. By now only two days remained for service of the Response. Ecovision did not serve a Response. On 1 July, RPC wrote another letter to Mr Jensen (this time 5 pages long) addressing, in succession, the position on jurisdiction which he had adopted (that Option W2 in the Sub-Contract in its unamended form applied), the position which Vinci had adopted (described by RPC as “stubbornly concealed”), and the current position (described by RPC as a “procedural mess”). RPC pointed out that if Mr Jensen was right that Option W2 of the Sub-Contract applied, Ecovision had always been contractually entitled to 14 days for service of the Response under W2.3(2), the initial direction given on 16 June allowing 7 days was wrong, and the request to the parties for agreement to extend the time for the Decision by 7 days as a condition of granting a 7 day extension for the Response was inappropriate and unnecessary. Since Ecovision had reserved its position in agreeing the extension, RPC said that there was now a real issue as to whether time for the Decision had been extended. Furthermore, because Vinci appeared to be accepting in the Referral that the Z clauses were terms of the Sub-Contract, there was also a real issue as to whether unamended Option W2 or amended Option W2 (importing the TeCSA Rules) was the right candidate and governed the procedure of the adjudication.

36. Mr Jensen answered on 2 July. He declined to require Vinci to make a submission about jurisdiction. He noted that W2.3(2) did not refer to the Response only. It provided that any further information from a party was to be submitted to the adjudicator within 14 days of the Referral, and this included the Reply. Since the Response was due on 2 July and had not yet been served and no further extension had been requested, Mr Jensen said that he would proceed to make his Decision if a Response was not forthcoming.

37. RPC replied in a final letter later the same day. The letter said that Ecovision would not be participating in the adjudication, that Mr Jensen was not a validly appointed adjudicator, and that he should resign.

38. Mr Jensen made his decision on 17 July 2014. He sent it to both parties the same day. He granted Vinci the declaration as to liability which it sought and found and declared that the loss and damage suffered by Vinci included the heads of loss identified in paragraph 208 of the Referral Notice. He directed that Ecovision should pay his fees of £4,698.00 plus VAT.

Ecovision's case

39. Mr Kearney, counsel for Ecovision, submits that where there is a “battle of forms”, in the sense that there are two or more adjudication procedures which may be applicable to the dispute, identifying the right one goes to the heart of the adjudicator’s jurisdiction and is therefore essential. Relying on the decisions of the Court of Appeal in *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2004] 1 WLR 2082 and *Lead Technical Services Ltd v CMS Medical* [2007] EWCA Civ 316, 116 ConLR 192 and the judgments of Edwards-Stuart J in *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10 (TCC) and Judge Stephen Davies in *Viridis UK Ltd v Mullaley and Co. Ltd* [2014] EWHC 268 (TCC), he advances the following propositions:

- (1) in order to be valid, a notice of adjudication must make clear to the adjudicator and to the responding party under what contractual provision or legislative power the right to adjudicate is being invoked.

- (2) where a request is made to an ANB to nominate an adjudicator, the request must be made in a manner which identifies the contractual provision or legislative power being invoked.
- (3) a notice of adjudication or purported nomination made under a contractual provision or legislative power which, on a correct analysis, does not apply is invalid.

40. Specifically in the context of the present case, Mr Kearney additionally submits that:

- (4) the effect of clause 10.1 of the core clauses (see paragraph 6 above) was to oblige Vinci to respond to Ecovision's repeated requests during the adjudication for clarification of the power which Vinci was purporting to invoke when it referred the dispute to adjudication.
- (5) it is an implied term of the Sub-Contract, which is required for business efficacy and reflects the presumed common intention of the parties, that "a party wishing to exercise a power under the contract will (a) in any event, alternatively (b) if queried, identify the contractual power and terms pursuant to which it does so".

41. Since Vinci did not identify the rules under which it was referring the dispute in the Notice of Adjudication, or when requesting the nomination of an adjudicator or in the Referral, or at any time before Mr Jensen published his Decision, Ecovision maintains that the Notice of Adjudication and the nomination of Mr Jensen are invalid.

42. As to which was the correctly applicable adjudication procedure in the present case, Mr Kearney submits that clause Z16 is determinative. Accordingly, the TeCSA Rules applied. It follows that, on Ecovision's case, Mr Jensen was not appointed by the correct ANB, and for that reason also, he lacked jurisdiction.

43. However, Mr Kearney has an overarching point which, if correct, renders consideration of the jurisdiction points of no more than academic interest. It is that Mr Jensen's decision was made late and is therefore a nullity. The Decision had to be

reached within 28 days after receipt of the Referral Notice (TeCSA Rule 21, section 106(2)(c) HGCRA and paragraph 19(1) of the Scheme). Under Option W2 it had to be notified also within the same period (W2.3(8)). 17 July 2014 was day 29.

44. Mr Kearney submits that there was no valid extension to 23 July. The purported extension ordered by Mr Jensen on 27 June was not an extension by consent of the referring party. The referring party's right to agree, or "gift", an extension of up to 14 days was expressly stated by Mr Jensen to have been preserved i.e. it was not used. The 7 day extension purported to be an extension by consent of both parties. However, Ecovision's consent was conditional on there having been a valid direction for the Response to be served within 7 days. At the time, there were two reasons to suppose that there had been no valid direction. The first was because the direction had been given before Mr Jensen received the notice of referral and was therefore one which he had no power to make. The second was that, if unamended Option W2 was the governing procedure, Ecovision was arguably contractually entitled to 14 days for the Response under W2.3(2). Ecovision does not rely on the second ground because it now says that the TeCSA Rules apply. But the first ground remains and in Mr Kearney's submission is a good one. The direction for service of the Response within 7 days of receipt of the Referral was an "initial direction" given by Mr Jensen on 16 June. The Referral was not delivered to Mr Jensen or to Ecovision until the morning of 18 June. The direction was therefore premature and made without jurisdiction. The proviso to Ecovision's consent to the 7 day extension of the time for making the Decision was not fulfilled.

45. A final and discrete complaint made by Ecovision is that Mr Jensen conducted the adjudication in a manner that is tainted by apparent bias and want of impartiality and fairness. This is relied upon both as a free-standing ground for contending that the Decision is not binding and as a reason, if the Decision is not binding on other grounds, for the Court directing that any fresh adjudication ought not to be conducted by Mr Jensen.

46. Whilst it probably does not do justice to his argument on apparent bias, the following list summarises the conduct of Mr Jensen which Mr Kearney criticises:

- (1) Accepting nomination as adjudicator where the source of his power to act and the procedure he was bound to apply was not identified.
- (2) Giving directions pre-Referral.
- (3) Not disclosing the Form DRS2C which he had in his possession until 30 June, when Ecovision had been asking since 23 June for a direction from Mr Jensen that Vinci should disclose their copy.
- (4) Declining to direct that Vinci should explain its position on jurisdiction, whilst criticising Ecovision for not asking him to do anything to investigate his jurisdiction and for not making its own submission to him on the question.
- (5) Waiting until 30 June before stating that he was treating his appointment as having been made under unamended Option W2, when on 23 June he had impliedly identified the Z clauses as applicable.
- (6) Adopting Option W2 as the basis for his jurisdiction, when Vinci had not put that forward.
- (7) Not addressing the legal authorities to which RPC had referred in correspondence.
- (8) Requiring Ecovision on 25 June to agree an extension of 7 days for reaching the Decision as a condition of receiving a 7 day extension for service of the Response when, under the Option W2 procedure which Mr Jensen later said applied, such an extension was arguably unnecessary because of W2.3(2).
- (9) Proceeding to reach a Decision on 17 July, when he still did not know what Vinci was saying was the basis of his jurisdiction and when Ecovision had ceased to participate in the adjudication on 2 July for that very reason.

Vinci's arguments

47. Mr Smith's response to these submissions on behalf of Vinci is as follows. It is a recipe for confusion and uncertainty to have two competing sets of adjudication provisions in one contract (see Judge Havery QC in *Epping Electrical Co. Ltd v Briggs and Forrester Plumbing Services Ltd* [2007] EWHC 4 (TCC) at para. 19): but in truth there is no competition or "battle of forms" here. Option W2 provides the dispute resolution procedure in the NEC3 form and this applies even where no express selection is made in Part One of the Sub-Contract Data. Option W2 envisages that the parties will have nominated an adjudicator and an ANB. The parties did so in

this case. In Part One of the Sub-Contract Data, the President of the RICS was chosen as the adjudicator and it was stated that the ANB was named in Appendix 6. Although the wording of Special Condition 7 was not felicitous, it is tolerably clear (says Mr Smith) that the parties intended the RICS to be the ANB. So there is no obvious reason why the parties would wish to incorporate the TeCSA Rules to govern the appointment of the adjudicator.

48. If Special Condition 7 cannot be interpreted as a choice of ANB, Mr Smith submits that Vinci was right to take the view that clause 6(1)(c) of the Scheme applied and that it was free to approach any ANB. To hold otherwise would mean that there was no effective mechanism for the appointment of an adjudicator if the President of the RICS could not act. In that event the Sub-Contract would have contravened section 108(2)(a) of the HGCRA and the Scheme would apply under section 108(5). Mr Smith submits that the same result follows (i.e. that the Scheme applies) if, on a true construction of the Sub-Contract Data, the non-selection of Option W2 meant that Option W2 did not apply.

49. Mr Smith's answer to clause Z16 is that, on a true analysis, it was not "properly incorporated" into the Sub-Contract or is of no effect. His argument is that only Appendices 2, 3, 5 and 6 to the Sub-Contract specifically amended the NEC3 form. Appendix 1 referred to the Sub-Contract Numbered Documents as comprising "The Description of Works". Document A (which contained the Z clauses) consisted of the Preliminaries pages of the Main Contract. They were only made part of the Sub-Contract insofar as they described the works to be carried out. Clause Z16 was not a clause of that kind. Mr Smith's two additional construction points are: (1) that if there is a conflict between the adjudication provisions in the Sub-Contract (Option W2) and the adjudication provisions in the Main Contract (clause Z16), the provisions of the Sub-Contract should prevail since that was the clear intention of the parties and (2) by analogy with the law on incorporation of arbitration agreements by reference (where it has long been held that specific mention must be made of the arbitration agreement in the incorporating provision), the adjudication provisions of the Main Contract were not incorporated into the Sub-Contract because no express mention was made of clause Z16 in Part One of the Sub-Contract Data or in Appendix 1.

50. Mr Smith submits that the arguments about which adjudication procedure applies bear some similarity to those in Bovis Lend Lease Ltd v Cofely Engineering Services [2009] EWHC 1120 (TCC). In that case (which concerned a series of sub-contract adjudications in connection with the building of the Manchester Civil Justice Centre), Coulson J had to decide which of two potential sets of adjudication provisions referred to in the sub-contract applied. One was in the Appendix to DOM/1. The other was in the Schedule of Amendments to the sub-contract in DOM/2. Coulson J held that the provisions in the Appendix prevailed over the Schedule of Amendments because clause 2.2 of the DOM/2 conditions said so. However, the Appendix was itself not clear because Part 1 incorporated Appendix 1 of the main contract in which a Mr Smith was nominated as adjudicator, whereas Part 8 of the Appendix included an express provision that the nominator of the adjudicator should be the President of the RICS. Under this provision, a Mr Bingham had been appointed by the RICS to act as adjudicator. Coulson J had to choose between Mr Smith and Mr Bingham. He held that the correct adjudicator was the person who had been nominated by the President of the RICS, namely, Mr Bingham. His reasoning was that Part 8 of the Appendix was a sub-contract provision which the parties had expressly amended. By contrast the reference to Mr Smith in Part 1 of the Appendix was in an extract of provisions from the main contract only. Coulson J went on to hold that if that was wrong, he would have concluded that the parties had failed to provide a valid express agreement as to the method by which the adjudicator would be nominated and Part 1 of the Scheme would have had to be implied into the sub-contract.

51. It was submitted by the defendant in Bovis that if the Scheme applied Mr Bingham was wrongly appointed because he was expressly appointed under Part 8 of the sub-contract rather than under the Scheme. Coulson J rejected that argument in the following terms:

“In my judgment, on the facts of this case, that would not affect his [Mr Bingham’s] jurisdiction. Unlike the situation in Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd [2003] EWCA Civ 1750, there is no dispute here about the existence or otherwise of a binding contract. Moreover, on this basis [i.e. that the Scheme applied], there could be no dispute that the RICS had the jurisdiction to nominate Mr Bingham, so the point in Lead Technical Services

Ltd v CMS Medical [2007] EWCA Civ 316, where there were two competing nominating bodies, would not arise either.”

52. By parity of reasoning Mr Smith says that the reference to TeCSA Rules in clause Z16 was in a recital of the adjudication provisions of the Main Contract. Option W2 was the adjudication procedure in the Sub-Contract and is therefore the relevant provision. Mr Jensen was validly appointed by the RICS as the chosen ANB either under Appendix 6 of the Sub-Contract Data or under the Scheme.

53. As to Mr Kearney’s proposition that a notice of adjudication must make clear the rules under which adjudication is being claimed, Mr Smith argues that this is not necessary where it is common ground that the contract under which the dispute has arisen is a construction contract within the definition in the HGCRA and the only issue is whether the right to claim adjudication arises under the Scheme or under contractual provisions. Mr Smith distinguishes *Pegram* on this basis and relies not only what Coulson J said in the *Bovis* case, in the passage just quoted, but on Coulson J’s judgment in *Dalkia Energy and Technical Services Ltd v Bell Group UK Ltd* [2009] EWHC 73 (TCC), 122 ConLR 66. At para. 77 of his judgment in *Dalkia*, Coulson J said:

“In circumstances where the parties accept that there is a written construction contract, the only issue is whether an express or implied set of adjudication provisions were incorporated into the contract. Such a situation is different to that in *Pegram* and such a dispute is one which the adjudicator has the jurisdiction to determine (see *Aveat*).

54. This last reference was to the decision of Judge Havery QC in *Aveat Heating Ltd v Jerram Falkus Construction Ltd* [2007] EWHC 73 (TCC), 113 ConLR 13. Judge Havery did not in terms hold that an adjudicator has power to determine which set of adjudication rules applies but in para. 12 of his judgment he rejected in short order any argument based on the *Pegram* decision that an adjudicator purportedly appointed under a contractual provision was not validly appointed if it was subsequently held that the Scheme applied.

55. Coulson J went further in the *Dalkia* case than Judge Havery by holding (at para. 42) that in circumstances where it was clear that there was a right to claim adjudication under one set of rules or another:

“... the adjudicator’s decision as to whether or not a particular set of contract conditions were incorporated or not would seem to me to be part of the dispute properly referred to him and would not ordinarily be a matter with which the court could interfere on enforcement.”

56. Mr Smith points out that Vinci plainly had a right to claim adjudication either under the provisions of the contract or the provisions of the Scheme. The notice of adjudication satisfied Option W2 and the Scheme in point of form. It gave a brief description of the dispute and explained the nature of the redress which was sought (W2.3(1) and clause 1(3) of the scheme). The notice did not have to identify whether it was given under one set of rules or the other. On 30 June Mr Jensen stated that he was applying the adjudication provisions of Option W2. Mr Jensen had jurisdiction to make that determination. In Mr Smith’s submission, that is an end of the matter.

57. As to the contention that the Decision was reached one day out of time, Mr Smith accepts that day 28 was 16 July but submits that Ecovision consented to the 7 day extension to 23 July. The qualification to that consent, namely, that Mr Jensen should have given a valid direction for service of the Response within 7 days of the Referral, was, in Mr Smith’s submission, fulfilled because Mr Jensen was validly appointed as adjudicator.

58. The allegations of apparent bias against Mr Jensen are strongly disputed by Vinci. It is unnecessary to rehearse Mr Smith’s argument on that question beyond saying that in his submission a fair minded and informed observer would not conclude from Mr Jensen’s conduct of the adjudication that he was other than completely impartial in his dealings with the parties.

Discussion

Was the Decision made out of time?

59. I deal with this point first because it is not in my view the shortcut to a decision in Ecovision's favour which Mr Kearney suggests.

60. The argument has two premises, both of which I accept. The first is that an adjudicator has no power to act until he receives the notice of referral (see Jackson LJ in *Lanes Group plc v Galliford Try Infrastructure Ltd* [2011] EWCA Civ 1617 at para. 40). The second is that a decision reached out of time is probably a nullity (see Akenhead J in *Lee v Chartered Properties (Building Ltd)* [2010] EWHC 1540 (TCC) at paras. 28-29 and *Coulson on Construction Adjudication*, 2nd ed. paras. 20.04-20.06). The argument is that the initial direction given by Mr Jensen on 16 June was invalid, even if he was properly appointed. The basis of it is that the initial direction had no effect unless it was repeated by Mr Jensen after the Referral was received. Ecovision's case is that it was not repeated. I regard these propositions on the facts of this case as dancing on the head of a pin. I see no reason why Mr Jensen's initial directions on 16 June should not be treated as advance warning of directions which he intended to take effect, and only to take effect, when the Referral Notice was received. After all, the 7 days for service of a Response was only expressed to run from the date of receipt of the Referral Notice. Even if this is not a permissible interpretation of the "initial direction", I reject the suggestion that the direction did not become operative because Mr Jensen did not expressly repeat it on or after 18 June. Whether what was said after 18 June was or was not a confirmation of the direction involves drawing such a narrow distinction that I do not consider it to be a meaningful one. It was well understood by Ecovision that Mr Jensen had directed the Response to be served within 7 days of the Referral. Systech acknowledged the direction in their letter to Mr Jensen of 24 June and Mr Jensen reminded RPC in his second letter of 24 June that Ecovision's Response was due the following day. In their long letter of 24 June, RPC challenged the direction on the basis that it contradicted Ecovision's entitlement under W2.3(2), not on the basis that it had been given at a time when Mr Jensen had no power to act. I find that the express, or if not express, implicit assumption underlying the correspondence between Mr Jensen and the parties from 18 June to 24 June was that he had given a direction that the Response was to be served within 7 days of the Referral. If Mr Jensen was validly appointed, there was in my judgment a sufficient reiteration of the direction after receipt of the Referral for it to have been a valid direction.

61. I will deal here, briefly, with Ecovision's challenge to the direction based on W2.3(2). The point is no longer pressed by Ecovision since its case now is that the adjudication was governed by the TeCSA Rules. Mr Kearney referred to the commentary on W2.3(2) in *Keating on NEC3*, 1st ed. at para. 11-073 as support for Ecovision's view that it was entitled to take up to 14 days preparing its Response and Mr Jensen was wrong to truncate that period. The authors point out that the referring party is required by W2.3(2) to supply all his supporting documentation within 7 days of the notice of adjudication (the text says "within seven days of the notice to refer" but this must be a typographical error). They go on to say: "The other party then has a period of 14 days within which to reply, subject to a right to extend that period by agreement. Once again, the adjudicator may set a timetable for further submissions provided that none are provided more than 14 days after the referral (unless agreed by all the parties)". Taking that passage as a whole, I do not think the authors are saying that the responding party has a contractual entitlement to 14 days from the notice of referral in which to serve the Response. If they are saying that, I respectfully disagree with them. The 14 day period in W2.3(2) is a period for service of further information by either party. The adjudicator is entitled to direct how much of that period should be allowed for a Response and how much for a Reply. If he wants, he can call for further information within a stated time outside the 14 day period rather than within it (see W2.3(4) and Coulson J in *Volker Stevin Ltd v Holystone Contracts Ltd* [2010] EWHC 2344 (TCC) at para. 12): but that is a matter for him. Mr Jensen was fully within his rights, if Option W2 governed the adjudication, to direct that the Response should be served within 7 days of the Referral.

Are the rules governing the adjudication a matter of jurisdiction?

62. The bedrock of Mr Kearney's submissions on this aspect is the leading judgment of May LJ in *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2004] 1 WLR 2082. In that case the adjudicator (Mr Morris) was nominated by the Association of Independent Construction Adjudicators. The Association was chosen as the ANB because the claimant maintained that the construction contract had been concluded on its standard conditions and was of the view that those conditions did not satisfy the requirements for adjudication in s. 108. So the Scheme applied by default. The

defendant resisted enforcement of the adjudicator's decision on the primary ground that, if there was a contract, it was one which incorporated the JCT Standard Prime Cost form (JCT PC 98). The nomination process under JCT PC 98 was different. Thus the defendant argued that Mr Morris had not been properly appointed. The defendant argued in the alternative that if the contract did not incorporate the JCT PC 98 form, no contract was concluded.

63. At first instance, Judge Thornton QC held that it was too late for the defendant to argue that there was no contract since it had contended in the adjudication that there was one, albeit on different terms to those asserted by the claimant. He held that the dispute was not about the existence of the contract but about its terms. That was a matter which the adjudicator could decide, and he had decided it. He had decided that the Scheme applied. Accordingly, the adjudicator had jurisdiction and his decision would be enforced. At paragraph 13 of his judgment, Judge Thornton said this:

“... Unless a pure question of jurisdiction as to whether or not a contract existed at all arises, a court ought ordinarily not decide a disputed question in enforcement proceedings since that question has been left, by the terms of the statutory jurisdiction of the adjudicator, for decision by the adjudicator.”

64. The Court of Appeal (May and Hale LJ and Hooper J) disagreed. The reasoning of May LJ is best reflected in the following extracts from paragraphs 29 to 32 of his judgment:

“29. ... In my judgment, the judge was wrong to conclude that it was not open to the defendants to advance their alternative contention [that there was no contract] in the enforcement proceedings. His decision was wrongly premised on the assumption that the defendants had accepted that there was a written construction contract, however the contractual dispute was resolved, and that the only dispute was as to its terms. The judge was also, I think, wrong to suppose that because (as he thought) there was a construction contract but the parties were not able clearly to identify its terms, the Scheme applied because the parties had not produced a construction contract which complied with s.108 of the 1996 Act. This was simply ducking the critical question.

30. The grounds of appeal essentially follow this line of reasoning. The defendants say that they have a real, not fanciful, prospect of establishing that Mr Morris acted without jurisdiction because he was appointed under the provisions of the Scheme when the Scheme did not apply; because on one view there was no written construction contract within s. 107 of the 1996 Act

at all; because he had no jurisdiction to determine his own jurisdiction; and because he decided the substantive adjudication with reference to conditions which did not apply. This last ground is a point of substance, since, as I have indicated, resolution of the contractual dispute was critical to any decision on the claimants' monetary claim.

31. The claimants contend that the judge properly took account of the defendant's contention in relation to the existence and identity of the construction contract and properly rejected it. Mr Hyam submits that it was a legitimate conclusion in the context of a summary judgment application that there was a written construction contract and that the identification of its precise terms was a matter of detail which did not impugn the existence of the contract, whatever its terms may have been. I rather rudely characterised this submission in argument as palm tree contractual analysis. I apologise for the rudeness but adhere to the sentiment. It was, in my judgment, necessary for the success of this summary judgment application to conclude that neither of the defendants' contentions as to the contractual situation [JCT PC 98 or no contract at all] had any real prospect of success. ...

32. The claimants further, by respondents' notice, contend that the no contract submission is not reasonably arguable. Mr Hyam submits that, where the factual matrix demonstrates an intention on both sides to be bound by written contractual terms of a building contract, the subject matter of which is certain and evidenced by extensive communications between the parties; where the work is complete but there remains a residual dispute as to the terms under which the work was carried out, an adjudicator or judge is entitled to conclude that there is no realistic prospect of the defendants establishing that there was no contract in existence, and thus no jurisdiction of the adjudicator to adjudicate. I agree that a judge would be entitled so to conclude in appropriate circumstances, but I do not consider that these are such circumstances. 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 at [30] and [31] of his judgment, including his characterisation of the situation as a "construction contract whose terms cannot be readily ascertained", suggests to me a real possibility that there was no written construction contract. I emphasise that I do not so decide. Mr Hyam's submission, however, overlooks the fact that the only circumstance in which the adjudicator would clearly have had jurisdiction was if the claimants' 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."

65. Mr Smith says that that Coulson J was right, in *Dalkia* and *Bovis*, to hold that the distinguishing feature of the *Pegram* case was the "no contract" argument and that

that factor alone justified the Court of Appeal's decision. Mr Smith submits that where the existence of the contract is not in issue, the reasoning in *Pegram* does not apply. In such a case there is no "pure question of jurisdiction" (see Judge Thornton at para. 13): the adjudicator has jurisdiction to determine the contract's terms. Mr Smith goes so far as to argue that if May LJ was suggesting in *Pegram* that a dispute as to the applicable rules for adjudication under an admitted contract could give rise to an issue of substantive jurisdiction, he was wrong and the other cases relied upon by Mr Kearney to similar effect (notably, in chronological order, *Lead Technical Services*, *Twintec* and *Viridis*) were wrongly decided also.

66. *Lead Technical Services Ltd v CMS Medical* [2007] EWCA Civ 316 was a case in which the defendant successfully appealed against a summary judgment enforcing the adjudicator's decision. The adjudicator had been appointed by the Institute of Civil Engineers (ICE) because the referring party asserted that the contract had been concluded in November or December 2002 on its standard conditions which provided for the ICE to be the ANB. However the defendant contended that the contract in 2002 had been superseded by a deed of appointment in September 2003. Under the deed, the TeCSA Rules governed any adjudication. The adjudicator grappled with that issue and held that the deed of appointment never came into force. He decided, in effect, that his nomination by the ICE had been regular and in accordance with the contract terms. The Court of Appeal was not impressed by the reasons given by the adjudicator for dismissing the deed of appointment or the reasons why the judge had agreed with him. Delivering the leading judgment, Moses LJ held that there was a real prospect of the defendant being able to prove that the agreement between the parties was on the terms contained in the deed. He went on to conclude (at para. 15): "If that is so, the adjudicator had no jurisdiction. He was appointed by the wrong body. The judge was wrong to enforce the adjudication by way of summary judgment". Without expressly saying so, the Court applied the reasoning in *Pegram*.

67. In *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10 (TCC) the argument was that the referring party, VFL, had obtained the nomination of the adjudicator by the President of the RICS under a contractual provision which did not exist. Twintec did not wait for the adjudicator to inquire into that point. It sought an injunction to

restrain the adjudication from proceeding. Twintec also said that the adjudication was inappropriate because there was parallel ongoing litigation touching on the same subject-matter. Edwards-Stuart J treated the first of Twintec's arguments as raising an issue of lack of jurisdiction of the adjudicator. VFL had sought the nomination from the President of the RICS on the footing that the contract between the parties was on the DOM/2 subcontract form. Edwards-Stuart J held that the subcontract had come into being when the letter of intent (LOI) was signed. The LOI did not incorporate the terms of the DOM/2 form or the nomination provisions in it. The Scheme applied to adjudication under the LOI not the contractual adjudication provisions in the DOM/2 form. The upshot was that the appointment of the adjudicator was invalid.

68. Edwards-Stuart J dealt with the jurisdiction issue in paragraphs 57-61 of his judgment in the following terms:

“57. The effect of my conclusions about the true meaning and effect of the LOI is that the 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 [counsel for VFL] submits that it makes no difference because the nominating authority who purported to nominate as 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 Ltd v Tally Weijl (UK) Ltd* [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 had 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 para 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 at [30]

and [31] of his judgment, including his characterisation of the situation as a "construction contract whose terms cannot be readily ascertained", suggests to me a real possibility that there was no 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 claimants' 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 is 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)."

69. In *Viridis UK Ltd v Mullaley & Co. Ltd* [2014] EWHC 268 (TCC), the issue was whether the adjudicator had power to determine whether the dispute referred to him arose under a single contract or under as many as 6 separate contracts (see paras. 69-82 of the judgment of Judge Stephen Davies under the heading "The Substantive Jurisdiction Issue"). The adjudicator nomination provisions were the same in all the contracts, but the adjudication procedures differed slightly. Judge Davies held, on the basis of what May LJ had said in *Pegram* about identification of the contractual terms being intrinsically necessary to the proper performance of the adjudication task, that the adjudicator could not make a binding determination of that question unless he had decided, correctly, that the dispute arose under a single contract which was the one under which he had been appointed. That was not the position in the *Viridis* case. Judge Davies found that the initial contract under which adjudication had been

claimed was not concluded and never became binding. He held that the dispute had arisen under three subsequent contracts. A footnote to *Viridis* is that Judge Davies did not therefore have to decide whether Akenhead J was right in *Air Design (Kent) Ltd v Deerglen (Jersey) Ltd* [2008] EWHC 3047 (TCC) to hold that an adjudicator, who, it is common ground, has been appointed under a contract to determine a dispute which necessarily involves considering whether there was more than one contract, has jurisdiction to determine that there was only one contract and to determine the extent to which that contract was varied. That is a separate question. It did not arise in *Viridis*, and it does not arise in this case either.

70. The principle I derive from the judgments in all these cases is that an adjudicator has no jurisdiction to determine whether he has jurisdiction, even on a temporarily enforceable basis, and that a choice between two sets of adjudication provisions will amount to such a determination if the choice makes a material difference as to how he should be appointed, what rules he is obliged to follow or the effect of his decision. This principle is subject to one exception which is that the adjudicator can inquire into his jurisdiction and make such a determination with temporarily binding effect if his conclusion coincides with the claimant's contentions as to the contractual terms and the claimant is right. My understanding is that this is not truly a concession about jurisdiction. It is more a pragmatic acknowledgment that if the adjudicator purports to decide what rules governed his appointment and govern the conduct of the adjudication, his decision will be enforced if his decision turns out to be correct. In truth the reason why that will be so is that the defendant will not be able to establish, either by the standard of a real prospect of success when seeking to resist summary judgment at the enforcement stage, or, on a final basis in the context of a Part 8 claim, that the adjudicator in fact lacked jurisdiction. The adjudicator will have decided that the rules under which he was purportedly appointed were the correct rules and the Court will have agreed with his conclusion.

71. It is not for this Court to hold that the Court of Appeal was wrong in *Pegram* or in *Lead Technical Services*. However, with due respect to May LJ and Moses LJ and to the first instance judges in *Twintec* and *Viridis*, I concur entirely with their analysis. I consider that even where it is common ground that a construction contract exists under which there is a right to claim adjudication, the adjudicator has no power

to determine what rules of adjudication apply if there is a dispute about those rules and the dispute affects (i.e. makes a material difference as to) the procedure for appointment, the procedure to be followed in the adjudication or the status of the decision. Specifically I hold that there is no rule that the Court will not interfere with an adjudicator's conclusion as to a matter affecting his jurisdiction when considering whether to enforce a decision by summary judgment (cf. paras. 42-44 of the judgment in *Dalkia*).

72. Mr Smith points out that the judgments of Coulson J in *Dalkia* and *Bovis* were not cited in *Twintec* (although counsel's researches have revealed that Edwards-Stuart J did have the judgment of Judge Havery in *Aveat Heating Ltd v Jerram Falkus Construction Ltd* cited to him in argument). Be that as it may, I do not think that it undermines the conclusion in *Twintec*. If, as I am inclined to think, it is not possible to reconcile *Aveat*, *Dalkia* and *Bovis* with *Pegram* and *Twintec*, I respectfully disagree with Judge Havery and Coulson J. It should, however, be noted that the reasoning in *Aveat* is so cryptic as to be of little assistance and that what was said by Coulson J about the *Pegram* case in *Dalkia* and *Bovis* was obiter.

73. What can also be said is that the present case has features which raise more starkly than in any of the other cases to which I have referred, why the choice of the correct adjudication rules was fundamental to the jurisdiction of the adjudicator.

74. The first such feature is that in all the other cases the referring party appears to have made plain at the outset the rules it was purporting to invoke when claiming adjudication. In this case Vinci did not disclose its hand other than by explaining in the Referral Notice how it arrived at the choice of ANB. Mr Jensen did not have the benefit of a statement by the referring party (Vinci) as to what adjudication rules it was saying applied or why. So he was not assisted in determining that question, if he was minded to do so. Instead the parties engaged in a degree of shadow boxing.

75. The second distinguishing feature of the present case (shared with *Pegram*, *Lead Technical Services* and *Twintec*) is that the different adjudication provisions are likely to involve different adjudicators being nominated. The choice of ANB in this case lies between The President of the RICS (under a charitable interpretation of

Special Condition 7 or chosen under paragraph 2(1)(c) of the Scheme) or the Chairman of TeCSA. It is possible but improbable that Mr Jensen would have been nominated by the Chairman of TeCSA. In *Pegram*, the choice was between appointment under the Scheme (because the claimant's standard conditions were non-compliant with the HGCRA) or appointment by the Association of Independent Construction Adjudicators. Mr Morris was appointed by the Association. It is not at all clear that Mr Morris would have been appointed under the Scheme because the Association might not have been chosen as the ANB if the Scheme applied. Similarly, in *Twintec*, the nominating body would not necessarily have been the same under the DOM/2 form because that form provided for alternative nominating bodies and there was no evidence that Twintec had agreed to choose the President of the RICS. As Edwards-Stuart J observed in para. 38 of his judgment, sometimes the choice of ANB matters. In *Lead Technical Services*, there were competing contractual ANBs and it was almost certain that the appointment would have been different if the ICE was not the right nominating body.

76. By contrast, in *Aveat*, the Scheme was held to displace a non-compliant contractual procedure. There was no choice to be made, as a matter of contractual construction, between compliant procedures. Moreover, the judgment implies that the adjudicator in fact appointed under clause 38A of the GC/Works subcontract could equally well have been appointed under the Scheme. In *Dalkia* the Court agreed with the view of the adjudicator that he had correctly been appointed under the Bell contract terms. So the case fell within May LJ's exception in *Pegram* ("*...the only circumstance in which the adjudicator would clearly have had jurisdiction was if the claimants' contentions as to the contractual terms were correct*"). In *Bovis*, Coulson J held that Mr Bingham had been correctly appointed under Part 8 of the Appendix to the sub-contract but, if he was wrong, that Mr Bingham could just as well have been appointed under the Scheme as under Part 8.

77. The third distinguishing feature of the present case is that not only do the different rules involve different ANBs, they contain real differences of procedure. I mention two which are apparent from the comparison in paragraph 17 above: (1) the period after service of the Notice of Adjudication within which the nominated adjudicator must confirm his willingness to act is 3 days under Option W2 (W2.3(1)),

5 days under TeCSA Rule 4 and 2 days under the Scheme (paragraphs 2(2) and 5(3)); (2) under Option W2 the adjudicator's decision becomes final and binding unless notice of dissatisfaction is given within 4 weeks of the decision or such other period as the parties may agree (W.2.3(11) and W2.4). Under TeCSA Rule 15 and paragraph 23(2) of the Scheme, the decision is only ever binding until the dispute is finally determined by legal proceedings or by arbitration or by agreement. There is no investigation of the procedural differences between the candidate rules in the reports of the other cases. They may or may not have been significant.

78. If a sufficiently secure identification of the contractual terms is intrinsically necessary to the proper performance of the adjudicator's task (see May LJ in *Pegram* at para. 32), what should be the consequence of a failure to make that identification? Mr Kearney submits that the notice of adjudication and the request for a nomination should be treated as invalid (see paragraph 39 above). A distinction may need to be made here between the formal validity of the notice of adjudication and its substantive validity. In *University of Brighton v Dovehouse Interiors Ltd* [2014] EWHC 940 (TCC) Carr J held (at paras. 77-78) that a notice of adjudication identifying the wrong ANB was still an effective notice of adjudication which was capable of commencing adjudication proceedings. The date of commencement of the adjudication was critical to the operation of a conclusive evidence clause (clause 1.9.2) in the underlying contract between the parties. The fact that the adjudicator who had been appointed under the erroneous notice by the wrong ANB, had subsequently regarded his nomination as a nullity and had resigned (see para. 10-11 of the judgment) did not mean that adjudication proceedings had not been commenced for the purposes of clause 1.9.2.

79. The decision in the *University of Brighton* case is a salutary reminder that the Scheme (like most bespoke adjudication rules) prescribes what the notice of adjudication must contain. A statement of the power under which adjudication is being invoked is not one of the essential ingredients. Nevertheless I am expressly invited by Mr Kearney to find in this case that the Notice of Adjudication was not valid and that the Form DRS2C was not an effective request for a nomination because the contractual terms under which adjudication was being claimed were not, or not adequately, identified. Mr Kearney invites these findings even if I was to hold that

Vinci is correct in saying that the applicable adjudication rules were those in unamended Option W2 and that Mr Jensen's appointment was made through the correct ANB and he rightly decided that Option W2 applied.

80. Whilst I accept that the judgment of Carr J in the *University of Brighton* case is not inconsistent with Mr Kearney's proposition that, in order to be valid, the Notice of Adjudication and any request for a nomination should identify the contractual terms or the power under which adjudication is being invoked, I am not prepared to go so far as to hold that this is a requirement. I do not believe that May LJ intended to go that far either when he referred in para. 32 of his judgment in *Pegram* to the difficulty of a "sufficiently secure identification of the contractual terms". Given that neither the Scheme nor the contractual candidate rules in this case prescribe that the Notice of Adjudication or any request to an ANB should specify the contractual terms as to adjudication or the power (if the Scheme) under which adjudication is being pursued, I do not think it would be right to hold that a notice or request for a nomination is invalid without this information. It would mean that in a case where the claimant's contention as to the applicable contractual terms was correct (or there was no real prospect of the defendant being able to prove otherwise) and where the adjudicator had been appointed in accordance with those terms, the Court could still decline to enforce the decision because, at the time the notice of adjudication was served or the nomination was requested, those terms were not stated as being the terms applicable. In such a case I would be loath to reach that conclusion. The substantive (as opposed to the formal) validity of the notice of adjudication depends on whether it can be shown that the correct rules are or have been applied. It does not depend on what is said in the notice. The same goes for the request for a nomination.

81. I am also not persuaded that Mr Kearney can achieve the same result via clause 10.1 of the core clauses or his suggested implied term (see paragraph 39 above).

82. However, I have no difficulty with Mr Kearney's third proposition (that a notice of adjudication or purported nomination made under a contractual provision or legislative power which, on a correct analysis, does not apply is invalid – paragraph

39(3)). It is in line with the decisions in *Pegram*, *Lead Technical Services*, *Twintec* and *Viridis* and in my judgment is correct.

The governing rules in this case

83. The debate in the preceding section of this judgment is, strictly speaking, obiter because I have come to the conclusion that Mr Kearney is right that the applicable adjudication rules are the TeCSA Rules. His reasoning, with which broadly I agree, proceeds as follows: (1) It is common ground that through Document A of Appendix 1 to the Sub-Contract Data, the Z clauses in the Schedule of Amendments to the Main Contract became additional conditions of the Sub-Contract; (2) Vinci advances a positive case in the Referral Notice that the Z clauses, in particular clauses Z3 and Z6, amend the standard terms of the Sub-Contract form; (3) Clause Z16 amended the standard terms of the Sub-Contract also; (4) It replaced Option W2 with the TeCSA Rules, which were the rules governing adjudication under the Main Contract; (5) This is reinforced by the fact that in Part One of the Sub-Contract Data, Vinci did not fill in the dispute resolution Option with a reference to Option W2. The space was left blank. Option W2 was expressly not selected; (6) But Vinci did insert in manuscript at the end of the first paragraph of General clause 1 that the conditions of the contract were “All as amended by the numbered documents in Appendix 1 annexed hereto”; (7) Thus, the parties expressly did not agree in the Sub-Contract Data to adopt Option W2 as the dispute resolution procedure. Instead they referred to Appendix 1 as amending the conditions of the Sub-Contract including as to the dispute resolution procedure; (8) It cannot be said that the express non-selection of Option W2 was an oversight when it is clear that the parties devoted attention in the Sub-Contract Data to other aspects of the dispute resolution process by expressly naming the adjudicator under the Main Contract and expressly naming the adjudicator under the Sub-Contract (the President of the RICS in both cases) and by purporting to agree on the identity of the ANB (unsuccessfully as it turns out because the wording of Special Condition 7 in Appendix 6 is not apt); (9) Adopting the Main Contract adjudication procedure for the Sub-Contract made commercial sense inasmuch as it enabled back-to-back adjudications under the Main Contract and the Sub-Contract to be conducted on a common procedural basis; (10) The joinder provisions in W2.3(3b) of Option W2 would not have worked where the Main Contract adjudication

procedure was under a different set of adjudication rules; (11) Also, if Option W2 had been chosen for the resolution of disputes under the Sub-Contract, the provision in W.2.3(11) that the adjudicator's decision becomes final and binding unless notice of dissatisfaction is given within 4 weeks, risked a decision under the Sub-Contract becoming conclusive in circumstances where a decision about a corresponding dispute under the Main Contract might remain open to challenge.

84. In response to this analysis, Mr Smith urges not only that the approach to construction taken by Coulson J in Bovis Lend Lease Ltd v Cofely Engineering Services leads to the conclusion that Option W2 remained the dispute resolution procedure under the Sub-Contract, but also that clause 20A.2 of the Sub-Contract compels this result. Clause 20A.2 is one of the new core clauses introduced by Appendix 2 to the Sub-Contract Data (see paragraph 14 above). Mr Smith acknowledges that the Z clauses form part of the Sub-Contract, but submits that their impact is circumscribed by the following words in clause 20A.2, “.... The Subcontractor ... shall observe, perform and comply with all the obligations and liabilities of the Contractor under the main contract ... *insofar as they relate to the Subcontract works.*” (my emphasis). He submits that the deletion of Option W2 and its replacement with the TeCSA Rules in clause Z16 had nothing to do with the Sub-Contract works and was not therefore an operative amendment or one of the Main Contract provisions that the parties to the Sub-Contract were obliged to follow.

85. When choosing, in the Bovis case, between the identification of the adjudicator in the main contract provisions in Part 1 of the Appendix and the adjudicator nomination clause in the sub-contract provisions in Part 8 of the Appendix, Coulson J held (at para. 27 of his judgment) that the intelligent reader looking for an answer to the question of how the adjudicator was to be appointed would pass over those Parts of the Appendix solely relating to the main contract and go to the later Parts dealing with the sub-contract. Mr Smith's submission is that the intelligent reader of the Sub-Contract in this case would do the same. He would ignore clause Z16 which is a clause which amended the adjudication provisions in the Main Contract, and focus on Option W2 in the NEC3 form, which was part of the basic framework of the Sub-Contract conditions.

86. Whilst this submission has some superficial attraction, there is a danger in seeking to extrapolate from the construction of one set of contractual terms, how a different set of contractual terms should be interpreted, save at a very abstract level. I do not think the analogy with the *Bovis* case works here. I bear in mind the principles of construction to which Coulson J referred in paras. 22-23 of his judgment in *Bovis*. They include (1) that written words which are inconsistent with printed terms usually take effect by superseding the latter and (2) that when construing contracts based on standard forms, deletions and amendments to the standard form terms are a legitimate tool to aid interpretation. In my judgment, Mr Smith's argument fails to accord sufficient or any weight to the deliberate non-selection of Option W2 in the first paragraph of clause 1 of Part One of the Sub-Contract Data, or to the manuscript insertion at the end of that paragraph of the wording which points out that the core clauses and Options are to be read as amended by the numbered documents in Appendix 1, or to clause 12.5.

87. Clause 12.5, like clause 20A.2, is another of the new core clauses which was inserted into the Sub-Contract by Appendix 2 to the Sub-Contract Data (see paragraph 13 above). However, unlike clause 20A.2, it was inserted into the section of the core clauses headed "Interpretation and the law". This is significant.

88. In my opinion, Mr Smith's reliance on clause 20A.2 is misplaced for a number of reasons. The first is that it is an amendment to the section of the core clauses of the Sub-Contract Conditions entitled "Sub-Contractor's main responsibilities". Clause 20A.2 is plainly designed to ensure that all obligations of the contractor to the employer under the Main Contract regarding the carrying out of the works are passed down to each subcontractor to the extent they bear on the subcontract works. It is a provision which has nothing to do with dispute resolution.

89. The second reason is that the core clauses, to which clause 20A.2 has been added, do not address dispute resolution. Dispute resolution is dealt with in the Option clauses, namely, Option W2 or Option W2 as amended.

90. The third reason is that, if, contrary to the above, the core clauses (as opposed to the Options) are relevant in determining the provisions for adjudication, they must

be read as a whole. Clause 20A.2 cannot be taken in isolation from clause 12.5 and clause 20A.1. Clause 12.5 establishes a hierarchy for construction under which, in the event of a conflict: (1) the manuscript insertions in the Sub-Contract Data prevail over the provisions in the numbered documents referred to in the Sub-Contract Data, (2) the provisions in the numbered documents prevail over the Conditions of Sub-Contract in the standard NEC3 Form, and (3) the terms of the Sub-Contract prevail over the provisions of the Main Contract. Applying that hierarchical approach, it is plain that no conflict arises at Stage 1 because there is no inconsistency between the non-selection of Option W2 in clause 1 of Part One of the Sub-Contract Data, and the manuscript insertion in the same clause that the numbered documents in Appendix 1 are to be treated as amending, *inter alia*, the dispute resolution Option. In other words, clause Z16 of Document A in Appendix 1 is not inconsistent with the balance of the Sub-Contract Data. At Stage 2, there is an apparent inconsistency between Option W2 in the Conditions of Sub-Contract and clause Z16 in Document A in Appendix 1, and Document A in Appendix 1 prevails. Stage 3 of the construction process is not reached, because although clause Z16 is a Main Contract provision, it is one which must be treated as having had the effect of amending the Conditions of Sub-Contract at Stages 1 or 2.

91. The fourth reason why clause 20A.2 does not in my judgment impose the qualification for which Mr Smith contends is that it comes immediately after clause 20A.1 and must be read with it. Clause 20A.1 (see paragraph 14 above) deems Ecovision to have full knowledge of the terms of the Main Contract. This is a necessary premise to the imposition of the “catch all” obligation on the Sub-Contractor in clause 20A.2. If Ecovision is deemed by clause 20A.2 to have full knowledge of the Main Contract terms, the incorporation of some of those terms via the Z clauses in Document A in Appendix 1 must serve some additional purpose. That purpose was to alter the terms of the Sub-Contract as the wording of the first paragraph of clause 1 of Part One of the Sub-Contract Data states. Clause Z16 did so by replacing Option W2 with the TeCSA Rules.

92. I take the view, as did Vinci in the adjudication (although Mr Smith tried arguing the contrary), that the wording of Special Condition 7 of Appendix 6 does not provide that the President of the RICS was to be the ANB. It is a nomination of the

President or any Vice-President as the adjudicator. It follows that not only was Mr Jensen wrong to decide that the governing adjudication rules were those in Option W2, his appointment was made by the wrong body. On both counts, I find that he lacked jurisdiction to make the Decision.

93. I mention here, for the sake of completeness, that Mr Kearney submits that if Option W2 was the governing procedure, the appointment of Mr Jensen was not made by the RICS within 4 days of the request as required by W2.2(3). It was made on day 5. Mr Kearney relies on the judgments of Judge Havery QC in *IDE Contracting Ltd v R.G. Carter Cambridge Ltd* [2004] EWHC 36 (TCC) at paras. 9-11 and Christopher Clarke J in *Vision Homes Ltd v LancsVille Construction Ltd* [2009] EWHC 2042 (TCC) for the proposition that a failure to observe strictly the procedure in the Scheme or in the contractual adjudication rules for the appointment of the adjudicator deprives him of jurisdiction. I note that both those cases were ones where the correct sequence of the procedure was not followed (named adjudicator stating that he was unwilling to act prior to notice of adjudication being given in *IDE Contracting*, request for nomination preceding notice of adjudication in *Vision Homes*). It was not a matter of the timing of steps otherwise taken in the right order. Mr Smith says that this is a crucial difference. I do not see why. It is true that any step taken before issue of the notice of adjudication is a step taken before the proceedings have been commenced and for that reason is a nullity. But strict compliance with the appointment procedure surely means compliance in every respect. In *Hart Investments Ltd v Fidler* [2006] EWHC 2857 (TCC), Judge Coulson QC (as he then was) held that a delay of only one day in referring the dispute beyond the period of 7 days in paragraph 8 of the Scheme rendered the referral notice invalid and the adjudication a nullity. I agree, therefore, with Mr Kearney that Mr Jensen's appointment was irregular if Option W2 applied, because he was appointed one day late, and was deprived of jurisdiction for that reason also.

Bias

94. As Dyson LJ pointed out in *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418 at para. 14, allegations of breach of the rules of natural justice tend to be of two kinds. One is where the person affected complains

that he did not have a fair opportunity of making representations before a decision was made. The other is where the losing party has been given the opportunity to be heard but says that the tribunal was not impartial in the way it dealt with his submissions. In the present case, Ecovision appears to have a foot in both camps. However, the nub of Ecovision's complaint is the way Mr Jensen handled the issue of jurisdiction. In the AMEC case, Dyson LJ held (at para. 41) that there was no obligation on an adjudicator to give the parties an opportunity to make representations to him about jurisdiction because the rules of natural justice are designed to protect parties from the risk of decisions *which affect their legal rights* being reached unfairly. A decision made without jurisdiction does not do so (see *Coulson*, op.cit. at para. 7.16). The whole complaint about bias must be viewed with this in mind.

95. The test is whether a fair minded and informed observer would conclude that there was a real possibility or real danger that the tribunal was biased (see Lord Hope in *Porter v Magill* [2002] 2 AC 357 at para. 103). Applying that test, with Lord Hope's further elaboration of it in *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731 at para. 17, Jackson LJ held in *Lanes Group plc v Galliford Try Infrastructure Ltd* [2011] 141 ConLR 46 at para. 51 that: "... the fair-minded observer must be assumed to know all relevant publicly available facts. He or she must be assumed to be neither complacent nor unduly sensitive or suspicious. He or she must be assumed to be fairly perspicacious, because he or she is able "to distinguish between what is relevant and what is irrelevant, and ... when exercising his judgment to decide what weight should be given to the facts that are relevant": see *Gillies'* case".

96. Applying that perspective, I am unable to accept that the fair-minded and informed observer might believe that Mr Jensen was biased against Ecovision. In my view, only two of the criticisms levelled against him are of any real weight. The first is that he failed to volunteer his copy of the Form DRS2C when Ecovision first asked him to direct that Vinci should disclose its copy. The second is that he did not order that Vinci explain its position on jurisdiction. The first of these omissions bears all the hallmarks of genuine oversight rather than a conscious decision to withhold information. The second must be viewed in the context of the "shadow boxing" to which I referred earlier. Both parties were being coy about what adjudication rules applied.

Neither was willing to give Mr Jensen the assistance he required on that issue. It left him in an awkward position. He was entitled to infer that since Vinci had obtained his appointment through nomination by the RICS, Vinci regarded Option W2 and/or the Scheme as applicable rather than the TeCSA Rules. True, it took him until 30 June to declare in favour of Option W2. However, even after he had done so, Ecovision declined to set out its case before Vinci explained its position. Mr Jensen's view was that it was for Ecovision to go first and, as the party challenging his jurisdiction, to explain why it believed that he did not have jurisdiction. In the circumstances, I do not think that the fair-minded and informed observer would believe that Mr Jensen was biased in taking that approach.

97. I have already held that Mr Jensen was justified in seeking Ecovision's agreement to the extension of 7 days for service of the Response in the way he did. Once Ecovision stated that it was withdrawing from the adjudication, it is hard to see how Mr Jensen can be accused of bias for having proceeded to make his Decision. If he had decided at that point to investigate his jurisdiction on the basis of submissions from Vinci, he would not have had the benefit of knowing what Ecovision had to say and would have risked running out of time unless Vinci agreed to another extension which it was unlikely to do.

98. The present case, in my judgment, is a long way from being one in which the fair minded and informed observer would feel that Mr Jensen was not trying his best to be even-handed. In my view the bias allegation is without substance. I would not have refused enforcement on the ground of apparent bias, if I had found that the decision was otherwise enforceable.

99. A question remains whether Mr Jensen should be available to be appointed as adjudicator if there is a second adjudication. Dyson LJ held in the AMEC case (at paras. 20-21) that the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias. In this case, a second adjudication would not be a re-run of the first, because Ecovision has yet to serve a Response. Mr Jensen is a professional. In my judgment he may be assumed to be trustworthy and able to approach the merits of the dispute with an open mind, if it is put before him on a second occasion.

Conclusion

100. Although Mr Jensen's Decision was probably made in time, whatever rules applied: he was not properly appointed and he purported to follow the wrong rules in the adjudication. For both reasons, he had no jurisdiction and I will grant a declaration to that effect.

101. If Vinci wants to pursue adjudication, it must start again. If the President or any Vice-President of the RICS is not available to act, the adjudicator must be appointed by the Chairman of TeCSA. It will be open to the Chairman to appoint Mr Jensen, if he chooses. The Adjudication Rules of TeCSA will govern the adjudication.