JUDGMENT: HIS HONOUR JUDGE THORNTON. TCC. 7th September 2000.

1. There are before the court three applications arising out of proceedings started by Cygnet Health Care Ltd., proceedings that are, in form, proceedings seeking the enforcement of a decision, or a purported decision, of an adjudicator that is dated the 16th June 2000.

2. The first application is that of Cygnet seeking summary judgment as the means of enforcing that decision. The second application is by Higgins City Ltd., the defendant to the proceedings and the respondent to the adjudication.

3. I will, for the sake of speed, no longer refer to the adjudication or the purported adjudication, but it was, and remains, the position of Higgins that no valid adjudication has ever taken place. That second application is for permission to amend the original application, being the third matter that I have before me, namely an application for a stay, pursuant to the Arbitration Act, on the grounds that there is an underlying arbitration clause in existence covering the disputes in question and, as an alternative, a stay pursuant to the inherent jurisdiction of the court as part of its case management functions; and on the grounds that it would be an abuse for the court to continue with the application for summary judgment in the light of the procedural circumstances that have occurred.

4. Briefly, the situation in this case is that extensive work was carried out for Cygnet by Higgins in relation to a nursing home and, after the work was concluded, disputes arose as to the reasonable time it should have taken to complete the work, as to the quality of the work that had been carried out, as to the ability of the claimant to recover liquidated damages for delay and as to the extent, if any, of the culpable delay giving rise to a claim for damages if, in principle, the claim for liquidated damages was open to Cygnet.

5. Those disputes were, once their existence became clear, overtaken by an underlying dispute as to whether or not there was a contract at all in existence between the parties, or whether, in the alternative, the work was done without there being an underlying contract because the parties had failed to enter into such an underlying contract. Cygnet, as is clear from their claim for liquidated damages, have always maintained that there was an underlying contract incorporating one of the JCT family of contracts, but Higgins have maintained that no such contract was in fact ever entered into and that there was therefore no contractual relationship between the parties, albeit of course underlying entitlements for restitutionary recovery by each party would arise as appropriate.

6. In the light of the formulation of claims by Cygnet, and that underlying difference between the parties as to the existence of a contract between them, there was correspondence between representatives of the parties in February 2000, which culminated in an agreement that disputes then known to be in existence between the parties would be referred to arbitration. The relevant parts of the correspondence start with a letter from Higgins' solicitor, Mr. Julian Holloway, a partner in the firm of Greenwoods then, and still instructed on their behalf, addressed to James R. Knowles, who were and remain the international construction lawyers acting on behalf of Cygnet, in which it stated that Higgins offered to agree to submit the present disputes to arbitration in the same manner as disputes would have been referred had there been a signed contract and/or a concluded agreement incorporating the JCT minor works form. The letter continued:
"Providing always that it is agreed that our client's position concerning the lack of a concluded agreement is preserved."

7. James R. Knowles replied, in a letter of the 25th February 2000, that they agreed to arbitration under the procedures provided in the JCT minor building works form. Mr. Holloway immediately replied on the 25th February that he, and of course Higgins, assumed that the acceptance to the arbitration proposal was premised on the basis that there was a disagreement as to whether or not there was a concluded agreement, and that the arbitrator has jurisdiction to determine that matter. On 28th February James R. Knowles replied:
"Although we do not consider it necessary, we confirm that Cygnet agree that one of the matters in dispute to be decided by arbitration is whether or not there is a contract between the parties for the above works."

8. The parties proceeded to agree to the appointment of Mr. Michael Black Q.C., as sole arbitrator. That appointment was confirmed by Mr. Black on the 23rd June 2000.

9. In the meantime, and without there evidently having been any prior discussion or intimation of the possibility of adjudication, on 26th April 2000 there was served on behalf of Cygnet notice of intention to seek adjudication. That led, at the request of Cygnet, to the appointment of an adjudicator. The matters referred to adjudication were primarily the question of the recovery of liquidated damages.

10. The response of Higgins was, from the outset, to contest the jurisdiction of the adjudicator, and by that Higgins clearly indicated that its contentions were that since there was no underlying construction contract, indeed no contract at all between the parties, there was no statutory entitlement to an adjudication at all. There was no express reference, in addition to that ground of objection, to the fact that the parties had recently, prior to the 26th April, entered into an ad hoc arbitration agreement which encompassed in terms that one of the disputes referred to arbitration was the underlying existence of a construction contract between the parties.

11. Following a hearing and the issuing of a decision by the adjudicator in favour of Cygnet, and soon thereafter the appointment of Mr. Black as the arbitrator, this application to enforce the adjudicator's decision was made. At about the same time Mr. Black informed the parties that he would hold in his chambers a first meeting as arbitrator, and that meeting is to take place on the 28th September 2000.

12. What I have been concerned with in the hearing so far is what amounts to an initial procedural objection by Higgins as well as a directions hearing in the application to enforce the adjudicator's decision, as to whether I should consider the application to enforce since, if I do so now, I will have to decide, as a necessary concomitant of that application, whether or not there is in existence a construction contract. I would, in consequence, be deciding that question in the light of the apparent agreement of the parties that that question be referred to arbitration by an ad hoc arbitration agreement entered into soon before the notice seeking adjudication was served and in circumstances in which it would have been a reasonable conclusion that that initial question of the existence or not of the underlying contract would be capable of relatively rapid determination by the arbitrator, possibly - and this will be a matter for him of course - at a first or preliminary hearing. I must therefore decide, in view of the agreement of the parties to refer that essential question to arbitration, whether it would be wrong for me to embark now and in advance of the arbitration upon a hearing of what amounts to the same issue, since I must, if I am to enforce the adjudicator's award, first determine conclusively whether or not there is a construction contract in existence between the parties.

13. It is contended on behalf of Cygnet, by Ms. Sternberg, that Cygnet have a statutory entitlement to adjudicate at any time whether or not there are parallel court proceedings or arbitration proceedings in existence and whether or not such proceedings have been initiated before or after the initiation of the adjudication. Ms. Sternberg understandably refers to, and relies on, the decision of Mr. Justice Dyson in **Herschel Engineering v Breen Property Ltd**., reported in 2000 B.L.R. at p.272, a decision which is now well known to practitioners in this field.

14. There are, however, as Mr. Steynor on behalf of Higgins has submitted, two features of this particular case which he. submits makes the Herschel decision of no persuasive effect. The first is that this case is one in which, unusually, the parties have entered into an ad hoc arbitration agreement which covers one of the very disputes that was immediately thereafter referred to the adjudicator, namely whether or not there was an underlying contract.

15. It was submitted by Ms. Sternberg that that particular dispute was not in fact the subject of the ad hoc reference to arbitration but it is clear from the extracts of the correspondence that I have read that that was one of the matters that was referred. If and in so far as the ad hoc arbitration agreement also incorporates the Minor Works arbitration clause (which appears to exclude from its ambit questions of the enforcement of the adjudicator's decision). I am satisfied that the one-off language of the correspondence is to be preferred, and to take precedence, to the formal provisions of that arbitration clause. The parties intended by that exchange of correspondence that there would be referred to, and embraced by, the arbitration clause, amongst other disputes, the question of the existence of the

underlying contract. This is also, of course, an essential question that must be resolved by this court as part of enforcement proceedings where there is a genuine dispute as to whether there was an underlying construction contract at all.

16. So in this case the parties had turned their minds to the question of which would be the appropriate way of seeking to resolve the essential dispute as to the existence of the contract before any question of adjudication had been raised, and had embarked upon the course of setting in train an ad hoc arbitration to resolve that question before any question of adjudication had been considered or raised.

17. I should, in this connection, also refer to a further submission of Ms. Sternberg that the arbitration now being conducted by Mr. Black Q.C. is not being conducted pursuant to an ad hoc arbitration clause but pursuant to an arbitration agreement entered into as ancillary to the agreement, or the purported construction agreement, that the parties made before work started on this particular project.

18. I cannot accept that submission because the parties clearly entered into an ad hoc arbitration agreement whether or not there was an underlying arbitration agreement, and sought to appoint Mr. Black pursuant to it and he also accepted his appointment pursuant to that ad hoc arbitration agreement. Therefore, whether or not there might be in existence an underlying arbitration agreement seems to me to be immaterial given the actual subsequent agreement and appointment that have occurred.

19. It follows, therefore, that there is a clear difference between this case and the Herschel case. This case involves a situation where the parties accepted that there was a genuine dispute as to the existence of a construction contract and then agreed to enter into an arbitration agreement whose purpose was to resolve that very question. They reached that agreement before any question of adjudication arose. That is a very different situation from the **Herschel** situation where there was accepted to be a construction contract in existence and where, in those circumstances, there was a clear statutory entitlement. if so desired, to parallel proceedings in both adjudication and either litigation or arbitration.

20. There is also, it is submitted, a second distinction from the Herschel case that should be taken into account, and it is to be found by reference to para.21 of the judgment of Mr. Justice Dyson in the Herschel case:

"As I said in the course of argument, if an extreme case of this kind were to occur and the claimant were to succeed before the adjudicator, the most likely outcome would be that the defendant would not comply with the adjudicator's decision. If the claimant then issued proceedings and sought summary judgment, the court would almost certainly exercise its discretion to stay execution of the judgment until a final decision was given in the county court proceedings. In any event, the fact that it is possible to conceive of a far-fetched example like this does not deflect me from the view that I have already expressed."

21. The language of Mr. Justice Dyson was phrased by reference to the underlying factual questions that he had to resolve, but it is clear that Mr. Justice Dyson was envisaging a situation similar to the situation with which, as I see it, I am confronted, namely the situation in which an adjudication has been started at the same time or after there has been initiated litigation or arbitration proceedings in circumstances in which the adjudication decision and its subsequent enforcement may substantially affect the course of the litigation or arbitration and where no practical or useful purpose can be seen to be achieved by allowing the adjudication enforcement proceedings to occur in advance of the conclusion of the litigation or arbitration.

22. In this case where, as I have found, the parties have, on the face of it, reached an agreement that the existence of the contract dispute should be resolved by arbitration, where they had clearly sought to set in train a speedy arbitration process to enable that matter to be resolved in the relatively near future and where a subsequent adjudication decision, if enforced, would require the court to itself resolve the very question that has been referred to arbitration. That is the sort of situation envisaged by the passage I have referred to in Mr. Justice Dyson's judgment in Herschel where it cannot be said that Cygnet has a clear statutory entitlement to adjudication in advance of the arbitration of the

dispute as to the existence of the contract. In those circumstances, it seems to me that it is inappropriate, at any rate at this juncture, for the court to embark upon a consideration of the validity of the adjudicator's decision, let alone to determine whether or not it should be enforced.

23. There are many ways procedurally that I could give effect to my underlying conclusion that, as a matter of good case management, and in compliance with the overriding objective, which of course all business in this court is conducted pursuant to, namely that the parties should save expense and should have the case dealt with in ways that are proportionate given the amount of money involved, expeditiously and fairly the arbitrator's decision as to the existence of the contract should come first. I could first hear the application to stay and grant a stay of the proceedings pursuant to arbitration, or pursuant to the inherent jurisdiction of the court; I could hear the application, even if I allowed it, and stay execution of the judgment; or I could indeed, if this was how the evidence turned out, hear the application and dismiss it.

24. But it seems to me that the appropriate course is to take such steps as will least interfere with, and least potentially affect, the outcome of the arbitration of the dispute as to the question of the existence of the underlying contract and, in those circumstances, the appropriate course is to simply adjourn all three applications that are before me - being the application for summary judgment, the application to amend the arbitration application, and the underlying arbitration application itself.

25. If I adjourn those applications generally, it will of course be open to either party at any time to apply to resume the hearing of any one or more of those applications, and if the circumstances change from those that I perceive as operating today, then that course would no doubt be one that would be both appropriate and acceded to by this court. The underlying circumstances are that, as I see it, the parties have agreed to a rapid resolution by a party appointed arbitrator of the question of the underlying existence of a construction contract, that the appointed arbitrator is holding a first directions hearing at the end of September and that it is to be reasonably anticipated at this stage, in the light of the considerations currently available, that the issue as to the underlying existence of the contract can be relatively rapidly resolved and determined by the arbitrator. Once that issue has been relatively rapidly determined, it will then be appropriate for this court to resume the consideration of the applications before it and to give such determination or conclusion as is appropriate in the light of the previous decision and award of the arbitrator.

26. Equally, if, for whatever reason, the anticipated relatively early conclusion of the arbitration on that issue is not achieved, it will then be appropriate for this court to continue the hearing of any one or more of the applications, but in the light of the knowledge that there has not been the relatively rapid conclusion to the arbitration hearing on that issue which, in my view, had been anticipated by the parties when they entered into the ad hoc arbitration clause in the first place.

27. It is for those reasons that the order that I propose to make on all three applications is to adjourn each generally, with liberty to apply.

28. I have, in delivering this ex tempore judgment, caused to have the mechanical recording apparatus turned on so that it is open to either party to apply through the usual procedures for a transcript of the judgment that I have given, and I draw that to the attention of the parties, since either or both parties may wish to have made available such a transcript to have placed before the arbitrator the judgment that I have delivered, and if either party wishes to adopt that course, the judgment can be made available at relatively short notice.

Ms. Lesli Sternberg (instructed by Messrs. H. Montlake & Co., Ilford) appeared on behalf of the Claimant.
Mr. Alan Steynor (instructed by Messrs. Greenwoods) appeared on behalf of the Defendant.