JUDGMENT : HIS HONOUR JUDGE HUMPHREY LLOYD QC: 19th September 2003.

1. These proceedings were brought under Part 8 to enforce the decision of an adjudicator. The defendant has applied pursuant to section 9 of the Arbitration Act 1996 to stay the proceedings. The claimant carried out work for the defendant in Tudor Street, EC4. It obtained the decision of an adjudicator and now claims the amount which the adjudicator decided should be paid. That claim is resisted preliminarily by the defendant, by saying that the real dispute between the parties is the subject of an arbitration agreement. There is no dispute between the parties that there is some agreement to arbitrate. However, essentially the question is one of the identification and interpretation of that agreement.

2. The work was carried out pursuant to an accepted letter of intent. The letter of intent was not the culmination of the negotiations that had started in April 2000, but came into being when they were still continuing.

3. The defendant had issued, for the purpose of tendering, documents which were based upon the JCT Standard Form of Building Contract with Contractor's Design, 1998 Edition. They were accompanied by a schedule of amendments. The schedule incorporated amendments to the articles and the JCT conditions, and it also contained proposals for the completion of the appendices to the JCT conditions. From the documents presented to me in the witness statements, all the proposals were the subject, not surprisingly, of discussion. The position prior to the issue of the letter of intent can be taken from a letter of 21" August 2000 from the claimant to Gardiner & Theobald, acting for the defendant, in which it set out its principal comments on the schedule of contract amendments. It is said by the defendant that the absence of any comment indicated an agreement by the defendants to the amendments which were then proposed. The amendments included the proposal that, for the purposes of adjudication, the adjudicator to be appointed, as set out in clause 39A.2 of the proposed appendix, would be Mr George Ashworth of Davis Langdon & Everest, or, in the event of his unavailability, a person nominated by him. For the purposes of clause 3913.1 (the person who would appoint an arbitrator) the appendix stated: *"President or a Vice President of the Royal Institution of Chartered Surveyors."*

   These provisions, and especially the former, formed a key part of the defendant's case as to the interpretation to be given to the letter of intent.

4. The letter of intent was dated 18th October 2000. It began by saying: *"Pending execution of a formal contract based upon an amended standard form of Building Contract with Contractor's Design 1998 Edition issued by the Joint Contract Tribunal with amendment 1 1999, TC/94/WCD and any further amendments as specified, drafts of which were included in the tender documents, and any other amendments as may be agreed between ourselves, we hereby issue this letter of intent of instruction in relation to your firm price tender dated 12 `h April 2000 for the execution and completion of the above works, including the development and completion of design and within a construction period to be agreed prior to contract."*

   It then said: *"The scope of the works is outlined in the Employers Requirements dated March 2000 at a total estimated cost of ±4.55 million, or such other sum as may be agreed."*

   Then, importantly: *"Until the execution of a contract in the form referred to above, neither you nor we shall be bound or committed in any way beyond the scope of the works instructed by this letter, and the terms of payment and all other terms and conditions, including the arbitration agreement in Article 5, shall be as contained in the form of contract referred to above."*

   The reference to Article 5 is wrong. The arbitration agreement is in Article 6A. Article 5 is about adjudication. The letter says what the work is to be done first, namely the provision of pre-contract services, and then the procurement of the second stage of tender. It also said:
   "If you want to place orders for work or materials, you must get prior written authorisation."

5. Mr Thomas helpfully demonstrated that the pre-construction services amounted to something less than £200,000, as priced by the defendant in its tender. This is relevant because the second page of the letter begins: "The payment for any works will be administered in accordance with the terms of the proposed contract as set out above. However, there will be no payment for the preconstruction services prior to January 2001. Until the formal building contract is completed, our maximum liability

to you will be f3.25 million. The value of the works carried out by you will, in due course, form part of the contract sum under the above mentioned contract if our negotiations are successful."

No formal contract was in fact completed, as envisaged by the letter of intent. The letter of intent was countersigned by the claimant as its acceptance. It therefore constituted a conditional or "if" contract. In my judgment the letter envisaged that substantial works could be carried out under its terms even though further authorisation was needed from the defendant once the initial or preparatory stages were complete.

6. Although Mr Thomas is anxious that I should not usurp the function of the arbitrator, on an application by a defendant to stay the action, it is, from time to time, inevitable that the court will have to decide the terms of the contract. It is not therefore a valid objection to the hearing of any part of an application to stay that that may happen. The decision on the application may also, therefore, resolve all or part of an underlying dispute between the parties that would otherwise go to arbitration. So here the defendant says that the real dispute between the parties was as to who should be appointed the adjudicator under the terms of the contract and that has to be decided by an arbitrator. That dispute in turn requires a decision about the meaning of the letter of intent. In my view the meaning of the letter has to be decided at this stage in order to deal with the claimant's case in answer to the defendant's application.

7. As I indicated in argument, the court may, on occasions, have to decide such points on an arbitration application. They may relate to the appointment of an arbitrator where there is doubt about who is to be the appointing body. They may relate to the jurisdiction of the arbitrator, where there is doubt about the extent of the contract and the terms of the contract relevant to questions of jurisdiction. They may, indeed, relate to whether or not there is an arbitration agreement in existence, and the determination that there is or is not one may effectively determine the whole of the underlying dispute, or part of it. These are matters which can also be decided by an arbitrator as the Arbitration Act 1996 so provides. However as they may go to the jurisdiction of the arbitrator the Act enables issues as to jurisdiction to be decided by the court either before, during or after the arbitration. The very fact that the underlying dispute is framed in terms of the interpretation of the contract, or the incorporation of a term, or the existence of an implied term or otherwise, does not mean, in my view, that a court should not, still less could not, decide the dispute if it is required to do so in order to dispose of a relevant submission of either party. Indeed, as I pointed out in argument, to relinquish such a duty would, in my view, be contrary to public policy, which is to promote the early settlement of disputes between the parties, whilst at the same respecting the parties' agreement. (That agreement is always subject to the exercise of the limited powers of the court granted by Part I of the 1996 Arbitration Act.) If the court, when competent to do so, has to decide an issue relating to all or part of a dispute, then so be it, even though the parties may have agreed originally that the disputes between them should be resolved by arbitration. If that agreement is not so clear and perfect that it cannot be enforced without recourse to the courts, then they must also take the risk that the courts may decide something that would otherwise be decided by an arbitral tribunal.

8. Much of the thrust of Mr Thomas' argument was based on the common ground of an intention to arbitrate and the existence of a dispute as to whether the adjudicator, Mr Biscoe, was correctly appointed or whether the adjudicator should have been Mr Ashworth. In my judgment the fact that each version of the contract contains an arbitration agreement does not itself assist Mr Thomas since the claimant's case requires a decision as to the terms of the agreement.

9. The claimant's other principal answer was to rely on Article 6A of the JCT conditions. Article 6A says:
"Where the entry in the appendix stating that clause 39B applies has not been deleted, then, subject to Article 5, if any dispute or difference as to any matter or thing of whatsoever nature arising out of this contract or in connection herewith, except in connection with the enforcement of any decision of an Adjudicator appointed to determine the dispute or difference arising thereunder, shall arise between the Parties either during the progress or after the completion or abandonment of the Works or after the determination of the employment of the Contractor,..... it shall be referred to arbitration under clause 39B and the JCT 1988 edition of the Construction Industry Model Arbitration Rules (CIMAR)."

10. In my judgment, contrary to the claimant's submissions, the clear effect of the terms of the letter of intent, is that, for the time being, the work should be carried out upon the terms which the defendant, as the writer of the letter, had itself originally proposed. Mr Thomas suggested that, the letter of intent could also be read as saying "and as may thereafter have been agreed". He referred to the text of the letter and words such as "and any other amendments as may be agreed between ourselves". However the letter does not say that. The letter of intent was evidently carefully drawn up by the defendant. There is no evidence that the proposals made by the claimant to Gardiner & Theobald had been agreed by the defendant itself. I do not accept the proposition that simply because, during the course of negotiations, a party had not rejected or disagreed with a proposal, then that proposal must be taken to have been agreed as an amendment to the terms of the proposed contract. The proposal might not have seemed important. It might become important later as a result of the course of the discussions. A party might then have to reject it or to suggest a necessary modification. In any event, in the absence of special circumstances, everything considered by the parties to be essential to their agreement is subject to reconsideration until the last moment. Furthermore, even if Mr Thomas was right in suggesting that some further amendments might in fact have been agreed, the letter provides no means of identifying them so as to attain the certainty that is necessary.

11. I conclude that the need of the defendant for the work to start took priority, and that it required that the claimant had to decide whether or not to accept that the work should be done, for the time being, on the terms originally proposed. I reach that conclusion since, first, the third paragraph states that *"the terms of payment and all other terms and conditions, the arbitration [sic] agreement shall be as contained in the form of contract referred to above"*; and secondly, shortly thereafter the letter refers again to *"the terms of the proposed contract"*. In the former extract *"the form of contract referred to above"* is one based upon an amended form. What would be the amendments? The amendments are, as I have already indicated, those set out in the schedule. It would theoretically be possible to carry out work even of this nature and magnitude on an unamended JCT form, but it would not be possible to do so on an unamended JCT form which did not have some, at least, of Appendix 1 to that form completed, because that Appendix requires decisions as to options set out in the standard form and it also requires decisions as to matters essential to an effective contract for any work, and certainly this work. Unless the options are selected and the Appendix is completed the form is incomplete and unusable and lacks the certainty required for the contract and envisaged by it. I cannot believe that the defendant would have allowed work to have started on such an uncertain basis., or that the claimant would have accepted such uncertainty. Accordingly, I read the words *"amended standard form"* as including the defendant's proposals set out in the schedule as it relates to the Appendix. That, therefore, would result in the adjudicator being Mr Ashworth and not Mr Biscoe.

12. That deals with the submissions on the composition of the contract. I now deal with the submissions on Article 6A. Mr Akenhead submitted that the defendant's case that a dispute that the wrong adjudicator was appointed is precisely within the exception to Article 6A. He submitted that the exception referred to *"any dispute or difference .... in connection with the enforcement of any decision of an Adjudicator appointed to determine the dispute or difference arising thereunder..."*, and that any such dispute should not *"be referred to arbitration under clause 39B ....."*. Mr Akenhead said that the dispute framed by the claimant fell within those words and thus was outside Article 6A and the ambit of section 9 of the Arbitration Act 1996.

13. Mr Thomas says that the exception only applies to the decision itself and not if the dispute is about the appointment of the adjudicator. Both parties have referred to **Macob v Morrison** [19991 BLR 93. Mr Thomas accepts that an application to stay under section 9 of the Arbitration Act would not normally prevent the enforcement of the decision of the adjudicator. (In addition to **Macob** he also referred to **Absolute Rentals v Gencor** 17 Con. LR 322 and **Comsite v Andritz** [20031 EWHC 958, 30th April 2003 unrep.) **Macob** provides some indication of the answer to that submission if it were determinative. Dyson J had to consider the question whether a decision purportedly made by an adjudicator was binding. Having looked at the terms of the 1996 Housing Grants etc Act, the Scheme made under it (not applicable here) and clause 27 of a different form of contract, he said:

"If it had been intended to qualify the word 'decision' in some way, then this could have been done. Why not give the word its plain and ordinary meaning? I confess that I can think of no good reason for not so doing, and none was suggested to me in argument. If his decision on the issue referred to him is wrong, whether because he erred on the facts or the law, or because in reaching his decision he made a procedural error which invalidates the decision, it is still a decision on the issue. Different considerations may well apply if he purports to decide a dispute which was not referred to him at all."

Dyson J was there foreshadowing the familiar question: is this a decision which the adjudicator was authorised to make? It was not, then it would not have been a decision in the sense discussed in **Macob**. If it was then, even if the decision was itself wrong (see **Bouygues)** or flawed it would nevertheless be a decision for the purposes of those three documents. Challenging a decision because it is said to have been unauthorised is not only a typical and legitimate way in which enforcement of a decision is resisted, but is probably the principal means available. So, here, the defendant's case is that this is not a decision which Mr Biscoe was authorised to make as he was not the right adjudicator.

14. It seems to me that the defendant's case shows precisely that there is "a dispute or difference ... in connection with the enforcement of any decision of an adjudicator appointed to determine". I agree with Mr Akenhead's submission and reading of the exception in Article 6A. A dispute about enforcement must include a dispute about whether the decision is enforceable at all, e.g. because it was not an authorised decision. The exception cannot relate solely to the enforcement of a decision of an adjudicator who has been validly appointed, because that would exclude most of the grounds relied on as to whether or not the decision is to be enforced. Ultimately, as I have said already, most amount to the question: is this a decision which the adjudicator was authorised to make? If the wrong adjudicator was appointed, then the decision was not authorised. If the adjudicator exceeded his jurisdiction, it was not authorised. If the adjudicator fails to follow the rules of natural justice, it was not authorised. I cannot believe that the words, which are quite wide, are intended somehow to exclude that kind of dispute and thus to require an arbitrator to decide whether the adjudicator was properly authorised to reach a decision, and yet to retain in the court only the power to determine any other matter in dispute in connection with the enforcement of a decision. Indeed, one might have posed the question in the light of that possible conclusion: what other matters would be left?

15. More realistically, I infer that the purposes of clause 6A was to ensure that matters relating to the enforcement of an adjudicator's decision should be severed from arbitration, which would be concerned with the underlying dispute, a point which both Mr Akenhead and indeed Mr Thomas have both made in different ways by reference to section 108 of the Act. The policy of the Act, if it has been followed by JCT (as I must assume that it has), is that the substantive dispute is to be resolved by litigation, or if selected, arbitration. Matters preliminary to the substantive dispute, i.e. whether the adjudicator made an enforceable decision, are not matters for the arbitrator. One can also add, as I said in the course of argument, the problems that can arise in terms of the time and expense that elapse in setting up an arbitration which would deal with such an preliminary point, which might perhaps, in the eyes of the JCT, have been best dealt with by the courts - see Article 6B. Even if CIMAR were used, it is unlikely that an arbitration could be set up and an award obtained on such a point in less time than this court would take, as it can (and generally does) shorten the times required (if asked) under the CPR.

16. Mr Akenhead also relied upon the provisions of the Act to the same effect. It is not necessary, I think, for me to say anything more about that part of the argument, since effectively I can decide the application upon the basis of Article 6A. However those submissions are also correct. Accordingly, I have reached the conclusion that the application to stay must fail, since the dispute as characterised by the defendant is one which falls within Article 6A.

Mr Robert Akinhead QC (instructed by Masons) appeared on behalf of the claimant.
Mr David Thomas QC (instructed by Kingsley Napley) appeared on behalf of the defendant.