JUDGMENT : HIS HONOUR JUDGE RICHARD SEYMOUR Q. C. TCC. 16th June 2003

1. In this action the Claimant, RSL (South West) Ltd. ("RSL"), seeks to enforce against the Defendant, Stansell Ltd. ("Stansell"), the decision ("the Decision") of Mr. Brian Hinchcliffe, acting or purporting to act as an adjudicator, dated 19 April 2003. By the Decision Mr. Hinchcliffe determined that Stansell should pay to RSL within seven days the amount by which £381,572.98, plus Value Added Tax as applicable, exceeded the amount which had already been paid to RSL in respect of the project in relation to which the dispute referred to Mr. Hinchcliffe for determination had arisen. It was common ground before me that the sum already paid was £302,250 plus Value Added Tax, and that the whole of the sum of £381,572.98 attracted Value Added Tax, so that the sum payable by reason of the Decision, if it was valid and enforceable, was £93,204.50. It was also common ground that no part of that sum had been paid.

2. An application was made in the action on behalf of RSL for summary judgment for the sum which it was claimed was due, alternatively for:
"an Interim Payment under Part 25.6 for any sum or part thereof due under the Adjudicators decision as the court may hold the Defendant liable to pay."

3. That application was resisted on behalf of Stansell. Mr. Alexander Nissen, who appeared as Counsel for Stansell at the hearing before me, contended that the Decision was not binding upon Stansell for three reasons. The first was that in reaching it Mr. Hinchcliffe had failed to comply with the terms of an agreement made with Mr. James Brydon of J. Brydon Associates Ltd., which company acted on behalf of Stansell in relation to the adjudication, by which Stansell agreed to the expressed wish of Mr. Hinchcliffe to seek assistance from Mr. Mark Adie in relation to programming issues which fell to be considered for the purposes of the adjudication. Mr. Hinchcliffe and Mr. Adie are in fact both senior consultants with the well-known firm, Messrs. E. C. Harris. The second reason put forward as to why Stansell was not bound by the decision of Mr. Hinchcliffe was that, so it was said, Mr. Hinchcliffe reached his decision in breach of the rules of natural justice. However, as I understand it, this was simply a different analysis from a legal point of view of the facts said to underlie the first reason. No separate matters were relied upon in addition to the contention that Mr. Hinchcliffe did not comply with the terms of the agreement to which I have referred. The third reason which was put forward as justifying the proposition that the decision of Mr. Hinchcliffe was not binding upon Stansell again seemed to be a different analysis in law of essentially the same basic facts, for it was that Mr. Hinchcliffe had wrongfully delegated to Mr. Adie the making of his decision in relation to extensions of time. That latter analysis did involve one more factual assertion, however, which was that Mr. Hinchcliffe simply adopted whatever conclusions Mr. Adie reached, without making any assessment of his own.

4. Stansell carries on business as a building contractor, while the business of RSL is that of structural steel fabricators and erectors. In 2000 Stansell was engaged upon a project ("the Project") at a site ("the Site") in Union Street, Bristol. For the purposes of the Project it was necessary that certain structural steelwork and staircases be fabricated and erected. In this judgment I shall refer to the fabrication and erection of that steelwork as 'the Sub-Contract Works".

5. By an agreement ("the Sub-Contract") apparently dated 8 September 2000 and made between Stansell and RSL, RSL agreed to undertake the Sub-Contract Works for Stansell. The Sub-Contract incorporated the provisions of the standard form of domestic sub-contract DOM/2 1981 Edition (reprinted 1998), published by the Construction Confederation, incorporating amendments 1 to 8. Clause 38A of that form of sub-contract contained provision for the parties to submit disputes which arose between them to adjudication. So far as is presently material, clause 38A was in these terms:

   ".1 Clause 38A applies, where pursuant to Article 3, either Party refers any dispute or difference arising under this Sub-Contract to adjudication....

   .4.1 When pursuant to Article 3 a Party requires a dispute or difference to be referred to adjudication then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication.....

.5.3 The Adjudicator shall within 28 days of his receipt of the referral and its accompanying documentation under clause 38A.4.1 and acting as an Adjudicator for the purposes of S.108 of the Housing Grants, Construction and Regeneration Act 1996 and not as an expert or arbitrator reach his decision and forthwith send that decision in writing to the Parties. Provided that the Party who has made the referral may consent to allowing the Adjudicator to extend the period of 28 days by up to 14 days, and that by agreement between the Parties after the referral has been made a longer period than 28 days may be notified jointly by the Parties to the Adjudicator within which to reach his decision...

.5.5 In reaching his decision the Adjudicator shall act impartially, set his own procedure and at his absolute discretion may, take the initiative in ascertaining the facts and the law as he considers necessary in respect of the referral which may include the following:...

.5.5.7 obtaining from others such information and advice as he considers necessary on technical and on legal matters subject to giving prior notice to the Parties together with a statement or estimate of the cost involved...

.7.1 The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

.7.2 The Parties shall, without prejudice to their other rights under the Contract, comply with the decisions of the Adjudicator, and the Contractor and the Sub-Contractor shall ensure that the decisions of the Adjudicator are given effect.

.7.3 If either Party does not comply with the decision of the Adjudicator the other Party shall be entitled to take proceedings in the Courts to secure such compliance pending any final determination of the referred dispute or difference pursuant to Clause 38A.7.1..."

6. The Sub-Contract Sum agreed for the purposes of the Sub-Contract was £288,500. It was also agreed that the execution of that part of the Sub-Contract Works which fell to be performed on the Site would commence on 27 November 2000 and that the works would be completed within eight weeks.

7. In the event it appears that the execution of that part of the Sub-Contract Works which fell to be carried out on the Site did not commence until 11 December 2000 and that the Sub-Contract Works were not completed until 15 July 2001. It was accepted on behalf of Stansell that it was responsible for the delay to the commencement of the Sub-Contract Works on the Site, and for the delays thereafter up to 2 January 2001, but there was a substantial dispute as to the causes of the bulk of the delay to the completion of the Sub-Contract Works.

8. Under cover of a letter dated 2 April 2001 RSL sent to Stansell a draft Final Account in respect of the Sub-Contract Works in the total sum of £335,394.84. That draft Final Account included elements in respect of what were said to be variations to the Sub Contract Works and items said to be reimbursable on a daywork basis, but did not include any element in respect of alleged loss and expense. The draft Final Account indicated that there was a claim in respect of additional drawing office costs, but that that had yet to be quantified. There were a number of exchanges between the parties in relation to the draft Final Account the detail of which is not presently material. A revised draft Final Account dated 6 September 2001 was in the total sum of £372,792.23 and included additional items said to be variations or to be reimbursable on a daywork basis, as well as quantifying the claim in respect of additional drawing office costs. Again there were exchanges between the parties concerning the revised draft Final Account. Under cover of a letter dated 28 January 2003 RSL submitted to Stansell a further revised Final Account, this time in the sum of £417,805.45. The differences between the elements in the new revised draft and its predecessor were a modest revision of £487.60 in the amounts claimed on a daywork basis, but most significantly the addition of a claim for loss and expense in the sum of £44,525.62. The letter dated 28 January 2003 requested a response from Stansell by 14 February 2003. No response was forthcoming by the date requested. In a letter to Stansell dated 14 February 2003 Mr. Edward Acford of RSL indicated that unless RSL heard from Stansell by 28 February 2003 it would assume that the parties were in dispute and would take advice as to its position. Mr. Richard Ross, Area Commercial Director of Stansell, did reply in a letter dated 20 February 2003 requesting a variety of pieces of further information.

9. RSL then instructed Knowles Legal Ltd. ("Knowles') to advise it and to act for it in adjudication proceedings. A notice of adjudication dated 3 March 2003 was served upon Stansell by Knowles on behalf of RSL. In the notice of adjudication under the heading "The nature of the dispute" appeared this:

   "*The dispute relates to the value of the Final Account for works carried out by the Referring Party under a Sub-Contract reference number SC16105451 USPH113 dated 8th September 2000.*

   The Referring Party maintain that the net amount currently paid by the Responding Party in the sum of £302,250.00 (excluding VAT) against their Final Account of £417, 805.45 (excluding VAT) is not a fair valuation of the works carried out in accordance with the terms of the Sub-Contract and accordingly is substantially undervalued."

10. On 6 March 2003 Mr. Hinchcliffe was nominated by the Royal Institution of Chartered Surveyors as adjudicator in relation to the dispute referred by the notice of adjudication dated 3 March 2003. He accepted appointment the same day.

11. In a letter to the representatives of the parties dated 19 March 2003 Mr. Hinchcliffe wrote as follows:
   "From my review of the Parties' documents, 1 note that parts of this matter tums [sic] on time issues. 1 intend to employ Mr. M. Adie BSc Msc MRICS ACIArb, who has planning experience, to assist me on programming matter [sic] where appropriate. Mr. Adie will be charged at the hourly rate of £80 per hour in respect of all time spent upon or in connection with adjudication, including time spent travelling.
   I require both parties to formally confirm their agreement to this arrangement by 17:00 hours on Monday 24th March 2003."

12. Mr. Paul Taplin of Knowles indicated in a letter dated 21 March 2003 to Mr. Hinchcliffe that "we have no objection to you using the services of Mr. Adie."

13. In a letter dated 24 March 2003 to Mr. Hinchcliffe Mr. Brydon wrote, so far as is material, as follows:-
   "In respect to you [sic] letter of 19th March 2003, regarding you [sic] intention to employ Mr. Adie, 1 confirm that my client has no objection to this. However, 1 would request that the following information be supplied,
   1. A copy of you [sic] letter of instruction to Mr. Adie.
   2. A copy of Mr. Adie's letter of response to you [sic] instruction.
   3. Site [sic] of any report prepared by Mr. Adie and reasonable time to comment upon that report.
   1 would be grateful if you would confirm your willingness to supply the above details at your earliest convenience."

   A copy of that letter was sent to Mr. Taplin.

14. Mr. Hinchcliffe did not in terms reply to the letter dated 24 March 2003 from Mr. Brydon. However, he did write a letter dated 8 April 2003 to Mr. Taplin and Mr. Brydon in which he said this:

   "I refer to my letter to the Parties dated 19 March 2003 regarding Mr. Adie assisting me with time issues.

   Following my instructions to Mr. Adie on 31 March 2003, (copy memorandum attached), he has now reported his initial findings which are summarised in the attached documents.

   1 now invite the Parties to make their observations regarding these findings in order to assist me in making my decision.

   The Parties are to keep these observations brief and raise no new matters or allegations, but comment only on the documents provided. Such observations are to reach me by 5.30 pm on 9 April 2003.

   I am mindful that a meeting with the parties' representatives may be helpful to deal with a number of matters. 1 will be available at our Bristol office on either Thursday or Friday (10 or 11 April 2003). Will the parties' representatives please confirm availability for such a meeting. "

15. The copy of the memorandum dated 31 March 2003 sent by Mr. Hinchcliffe to Mr. Adie enclosed with his letter dated 8 April 2003 to Mr. Taplin and Mr. Brydon was in these terms:
   "Further to my letter to the parties' [sic] on 19 March 2003 (copy attached), I confirm that both parties have now agreed to your now being employed to assist me with programming matters in the above adjudication. Will you therefore now proceed in reviewing the time issues outlined in:
   1) Appendix J of the Referral Notice; and

2) Appendix C of the Response to the Referral
In the first instance please where possible identify whether any of the delays alleged are valid.
Your brief report should then enable me to determine what, if any, prolongation or contra charges attach to these delays.
Please undertake your initial investigation by Friday 4 April so that we can discuss this during your visit to Exeter office. Please allocate time on this work to Contract No. 202/5038."

16. The terms of the report made by Mr. Adie in response to those instructions, of which a copy was also enclosed with Mr. Hinchcliffe's letter dated 8 April 2003 to Mr. Taplin and Mr. Brydon, were these:

"In respect of your memorandum of 31 March 2003, the following is a high level summary report on the captioned matter.

Appended to this report is a schedule of significant delay events identified from the information available in the Appendices J and C of the Referral Notice and the Response to the Referral Notice respectively. The item numbers therein refer to the full chronology (also attached) built up from the documentation reviewed. Note that the minimum planning unit adopted is one day.

The information included is not definitive for the following reasons,

1. *Concurrent delay issues cannot be fully and/or adequately identified from the information provided,*
2. *The delays identified are potential only as it is not clear from the information provided what the true reason for the delay is,*
3. *A potentially, significant source of delay is the re-sequencing of the fabrication programme resultant from the design delays indicated prior to the commencement on site. However from the information provided it is not clear how the fabrication sequence was effected [sic] and what impact this had on the programme,*
4. *There is limited information provided relating to the timing of additional works instructed during the execution of the works. 1 have therefore been unable to identify what delay is attributable to the additional works and whether there is any entitlement to any extension of time;*

Whilst I appreciate that this does not provide a definitive answer to your enquiry, I trust that it assists you to progress your adjudication.

Please do not hesitate to contact me should you wish to discuss any of the matters included in the documents."

There were two attachments to that report. In the first some 16 matters of delay or potential delay were set out, cross-referenced to a chronology which was the second attachment, with an indication of the period of delay possibly caused in 15 of the 16 cases and remarks. While two of the identified periods of delay were said to be concurrent with other periods, the aggregate total of the number of calendar days delay not indicated as concurrent was 102.

17. Mr. Taplin on behalf of RSL sent a response to the report of Mr. Adie to Mr. Hinchcliffe under cover of a letter dated 9 April 2003. Mr. Brydon did not send a response. At paragraph 25 of his witness statement dated 5 June 2003 made for the purposes of the hearing of the application for summary judgment or an interim payment made on behalf of RSL Mr. Brydon explained that he had not thought that it was necessary to make any response because Mr. Adie had concluded in his report that RSL had failed to prove its case in relation to the causes of the delays of which it complained.

18. Mr. Hinchcliffe wrote again to Mr. Taplin and Mr. Brydon on 10 April 2003. What he said was:
"I refer to my letter to the Parties dated 8 April 2003 enclosing Mr. Adie's initial findings.
1 acknowledge receipt of Mr. Taplin's fax dated 9 April 2003 providing comments on behalf of the Referring Party.
I note that I have not received any observations from the Responding Party.
I have referred Mr. Taplin's observations to Mr. Adie and attach his response herewith.
From this response you will see that Mr. Adie has reviewed such sub-contract documents as have been provided in Appendix D.
Mr. Adie will now review Appendices E, G, L & M based upon Mr. Taplin's comments. However, for the avoidance of doubt Mr. Adie has only been requested to review the claims made by the Parties in Appendices J and C, as supported by the appropriate Appendices. It is not for myself (or Mr. Adie) to make the Parties case for

them by arriving at conclusions which may or may not be pleaded. This point is made against the background of the ruling in the case of Balfour Beatty Construction v. Lambeth London Borough Council.
1 believe this matter would be best discussed during our meeting in Bristol tomorrow."

19. The response of Mr. Adie to the comments of Mr. Taplin was set out in a memorandum dated 10 April 2003 to Mr. Hinchcliffe. It was as follows:
"I acknowledge receipt, this morning at 08:07 his, of a copy of the facsimile received by yourself from James R. Knowles dated 09 April 2003. The facsimile provides comments on the Summary Report and Chronology Document produced by myself.
I note Mr. Taplin's reference to Appendices D, E, G, L and M in respect of providing other information and confirm that the review undertaken was to identify whether any of the delays alleged were valid in the light of the information within Appendices J of the Referral Notice and C of the Response to the Referral Notice. I can also confirm that in undertaking this review I was aware of the subcontract and its provisions in relation to Extension of Time matters.
In the light of the information in Appendices J of the Referral Notice and C of the Response to the Referral Notice I maintain the validity of the statements made in the bullet points of the report. In respect of the completeness of the summary of delays it is clearly stated in the summary that the response provided is not considered to be definitive and has been provided as an initial review on the basis of progressing the adjudication.
Finally I confirm your oral instructions for the Chronology and Summary Reports to be reveiewed [sic] further in respect of Appendices E, G, L and M. I confirm I can undertake this exercise."

20. Mr. Hinchcliffe described the role of Mr. Adie in the adjudication at paragraph 18 of the Decision in this way:
"With the Parties approval Mr. M. Adie BSc., MSc., MRICS, and ACIArb has assisted me in my programme analysis, whose preliminary findings were offered to the Parties for comment. Based upon the responses received and subsequent findings I have made my decision."

21. At paragraph 72 of the Decision Mr. Hinchcliffe said:

"In arriving at my decision on the issue of time I have considered the final report on the programme aspects of the Adjudication prepared by Mr. Adie. This final report has taken into account the evidence given by the Parties following their review of Mr. Adie's preliminary findings."

22. Mr. Hinchcliffe indicated his conclusion on the question of time at paragraph 77 of his decision:

"Having considered the Parties submissions and Mr. Adie's findings on these matters, I am persuaded that an extension of time of 55 working days is due to RSL. Based upon this extended period it is my decision that the extended completion date for the Sub-Contract Works is 30 April 2001."

He set out at paragraph 76 of the Decision brief details of eight particular matters which he considered entitled RSL to that extension of time. The value of the extension of time in cash terms Mr. Hinchcliffe assessed at paragraph 99 of his decision as £28,220.47, plus Value Added Tax, namely a total of £33,159.05.

23. After Mr. Hinchcliffe's decision became known Mr. Brydon wrote him a letter dated 23 April 2003 which was in the following terms:
"I refer to your decision on the above matter, published on 19th April 2003.
I note that in the section headed "Time" you have, in reaching your decision, considered the final report on programming aspects of the Adjudication prepared by your planning expert, Mr. Adie.
My letter of 23rd March 2003, agreeing to the appointment of Mr. Adie required "Sight of any report prepared by Mr. Adie and reasonable time to comment upon that report".
I would record that I have not seen the final report nor been invited to comment upon it, nor has my client.
I would therefore ask,
1. Has this final report been forwarded to and commented upon by RSL and/or their advisors?
2. Did you forward a copy of this final report to me and if so, when?
3. May I now have a copy of the final report?
In addition, I would ask that you supply an analysis of the time taken, periods and tasks undertaken by Mr. Adie upon your instruction during this adjudication.
I trust that you will appreciate the urgency of my request and I would ask that you respond by return."

24. Mr. Hinchcliffe did reply in a letter dated 23 April 2003 to Mr. Taplin and Mr. Brydon. He wrote:
"I acknowledge receipt of Mr. Brydon's e-mail dated 21 April 2003 forwarding his letter dated 23 April 2003 which contains queries related to my Decision in the above adjudication.
Whilst I note Mr. Brydon's reference to his qualified acceptance of Mr. Adie's appointment these comments appear to be out with [sic] the provisions of Clause 38A.
I remind you that in assisting me, Mr. Adie's preliminary advice on his programme analysis was forwarded to the Parties for comment on 8 April 2003. Whilst formal comments were received from Mr. Taplin in the timescale set, I received none from Mr. Brydon. I instructed Mr. Adie to consider the comments received and further works were then undertaken.
The matter of time was then dealt with in detail during my meeting with the parties held on Friday 11 April 2003 in Bristol. Details of the matters discussed at the meeting were communicated to Mr. Adie who then considered these in giving his further advice.
Having heard the Parties evidence, considered their submissions and considered Mr. Adie's advice I did not consider it necessary to refer back to the parties for comment. Indeed since Mr. Brydon declined to grant me an extension of time beyond 19 April 2003, there was insufficient time to do so.
Against the above background, and in answer to questions 1, 2 and 3 of Mr. Brydon's letter, I reply as follows:
1) The report has not been forwarded to RSL and/or its advisors for comment.
2) As inferred above the report has not been forwarded to Mr. Brydon.
3) I consider it would now serve no useful purpose to issue Mr. Adie's report to the Parties. Reasons are already provided in my Decision.
May I remind you that I am now Functus Officio in this adjudication and my authority to deal with further matters is at an end.
With regard to your request for details of the times spent by Mr. Adie on this matter, these details are being prepared and will be forwarded to the Parties in due course."

25. The main ground upon which it was contended on behalf of Stansell by Mr. Nissen that the decision of Mr. Hinchcliffe was not binding upon it was that he failed to give it an opportunity to comment upon the final report of Mr. Adie before reaching his conclusions in relation to that part of the claims of RSL which related to loss and expense in respect of delay to the completion of the Sub-Contract Works. That, as I have said, was variously characterised as amounting to a breach of the agreement under which Stansell had agreed to him employing Mr. Adie, or a breach of natural justice. The subsidiary, but conceptually separate, ground of objection was that there had been a wrongful delegation of the decision in relation to the entitlement of RSL to an extension of time for completion of the Sub-Contract Works to Mr. Adie.

26. The answer to the objection of Stansell to the validity of the decision of Mr. Hinchcliffe put forward in the first witness statement of Mr. Paul Taplin made in support of the application for summary judgment or an interim payment was in essence that the final report of Mr. Adie had not been made available to RSL for comment either and in any event there had been no time to permit consideration of that report before the timelimit fixed by clause 38A.5.3 within which Mr. Hinchcliffe had to give his decision expired. Mr. Taplin made the point that Mr. Hinchcliffe had requested the agreement of the parties to an extension of time, but Mr. Brydon had refused on behalf of Stansell. Mr. Brydon riposted in his witness statement that the agreement of Stansell had never been sought to the grant of an extension so that it could have an opportunity to comment on the final report of Mr. Adie. Rather consent had been sought apparently on the ground that Mr. Hinchcliffe was pressed with other professional commitments. In his second witness statement Mr. Taplin made the points that it was plain from the terms of the report of Mr. Adie which was copied to the parties that it was a preliminary report and was likely to be followed by a statement of Mr. Adie's concluded views. He also contested the assertion by Mr. Brydon in his witness statement that the terms of Mr. Adie's initial report indicated that his views at that stage favoured the case of Stansell. Mr. Taplin pointed out that some of the events relied upon on behalf of RSL had values in terms of days of delay attributed to them in the attachments to Mr. Adie's initial report and also that Stansell actually had a counterclaim in respect of delay against RSL which in his initial report Mr. Adie did not seem to find impressive.

27. In his reply to Mr. Brydon's letter dated 23 April 2003 Mr. Hinchcliffe seemed to be hinting at a view that he had power under clause 38A of the Sub-Contract to seek assistance from others without the consent of the parties to an adjudication, so that his disregard of the terms upon which any consent was given was not material. Presumably what he had in mind was the terms of clause 38A.5.7.

28. Miss Sarah Hannaford, who appeared on behalf of RSL on the hearing of the application for summary judgment or an interim payment, adopted a rather different focus in her submissions from that in the witness statements of Mr. Taplin. She urged upon me strongly that Mr. Hinchcliffe had had power under clause 38A.5.5.7 to seek the assistance of Mr. Adie without the need for any agreement from Stansell. She submitted that in any event, upon proper construction of the letter dated 24 March 2003 written by Mr. Brydon, Mr. Brydon had not sought to make agreement to the employment of Mr. Adie conditional upon anything. Rather he had given unconditional consent and had followed that with a request that he be accommodated in relation to the three matters to which he referred. If, contrary to that submission, Mr. Brydon had sought to make the consent of Stansell conditional upon the acceptance of the terms set out in the letter dated 24 March 2003, Miss Hannaford contended that Mr. Hinchcliffe had not agreed to those terms. She accepted that he had actually provided the documents which were the subject of the first two terms and a copy of Mr. Adie's preliminary report, but she submitted that that conduct did not amount to consent to Mr. Brydon's terms. It was simply doing what natural justice required.

29. Insofar as Stansell complained of a breach of the requirements of natural justice because it was not given an opportunity to comment upon the final report of Mr. Adie, Miss Hannaford asserted that the real cause of Stansell's predicament was that it had elected not to comment upon Mr. Adie's initial report or to seek at that time to demonstrate the accuracy of its case in the adjudication that the delays of which RSL complained were all actually the fault of RSL. Miss Hannaford submitted that Stansell had had a number of opportunities to explain, and to seek to prove, its case to Mr. Hinchcliffe, not least at the meeting with him on 11 April 2003 and in documents supplied by it to Mr. Hinchcliffe thereafter, and there was no substance in the suggestion of breach of natural justice.

30. At paragraph 16 of her skeleton argument Miss Hannaford contended that:
"Given the nature of the adjudication process, there is an inevitable tension between the need for certain standards of impartiality and fairness and what is realistic and possible. Adjudication is a speedy method of provisional resolution of a dispute and will inevitably involve rougher justice than would be expected in a full trial or arbitration. Adjudication is not and cannot be a counsel of perfection."
She then referred to the observations of Dyson J, as he then was, in **Macob Civil Engineering Ltd. v. Morrison Construction Ltd**. (1999) BLR 93 at 97 that:
"It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept"
Miss Hannaford also referred me to the comments of H.H. Judge Bowsher Q.C. in **Discain Project Services Ltd. v. Opecprime Development Ltd**. [2000] BLR 402 at page 404 that:
"In Macob Civil Engineering Ltd. v. Morrison Construction Ltd. (1999) BLR 93 Mr. Justice Dyson made it plain that a mere procedural error should not invalidate an adjudicator's decision. If one looks hard enough of course one can find in many adjudications a breach of natural justice because of the speed with which things are being done. So a court should not be astute to upset a decision of adjudication on grounds of procedural error."
Judge Bowsher added at page 405:
"It would be quite wrong for parties to search around for breaches of the rules of natural justice. It is a question of fact and degree in each case, and in this case the adjudicator over-stretched the rules."
At paragraph 18 of her skeleton argument Miss Hannaford submitted that;-
"This tension has led to the formula put forward in Glencot Development v. Ben Barrett [2001] BLR 207. There it was accepted that
"the adjudicator had to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit.""

31. It seems to me that the responses of Mr. Taplin to the objection taken on behalf of Stansell and the submissions of Miss Hannaford, both in relation to the question whether there was an agreement

between Mr. Hinchcliffe and Stansell that he would afford it an opportunity to comment on any report produced by Mr. Adie and as to breaches of natural justice, demonstrate a rather worrying inability to understand what in my judgment is the real point. The introduction of systems of adjudication has undoubtedly brought many benefits to the construction industry in this country, but at a price. The price, which Parliament, and to a large extent the industry, has considered justified, is that the procedure adopted in the interests of speed is inevitably somewhat rough and ready and carries with it the risk of significant injustice. That risk can be minimised by adjudicators maintaining a firm grasp upon the principles of natural justice and applying them without fear or favour. The risk is increased if attempts are made to explore the boundaries of the proper scope and function of adjudication with a view to commercial advantage. It has been pointed out before that the principles of natural justice apply to adjudication - see, for example, in addition to the decisions to which I have already referred, **Woods Hardwick Ltd. v. Chiltern Air Conditioning Ltd**. [2001] BLR 23; **Discain Project Services Ltd. v. Opecprime Development Ltd.** [2001] BLR 285 and Balfour Beatty Construction Ltd. v. The Mayor and Burgesses of the London Borough of Lambeth [2002] BLR 288. Where an adjudication takes place pursuant to a procedure contained in the express terms of a contract between the relevant parties, a duty on the part of the adjudicator to act impartially may either be express, as in clause 38A.5.5 in the present case, or be a term necessary to be implied as representing the actual, but unexpressed, agreement of the parties. Where the adjudication takes place because of the implication into the agreement actually made by the parties, by virtue of Housing Grants, Construction and Regeneration Act 1996 s.114(4), of the operative provisions of The Scheme for Construction Contracts, set out in the Schedule to The Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998 No. 649, one of the provisions of that scheme, in paragraph 12(a) of Part 1, is that "The adjudicator shall ... act impartially in carrying out his duties..."The duty to act impartially is, in its essence, a duty to observe the rules of natural justice. It is not simply a duty not to show bias.

32. It is elementary that the rules of natural justice require that a party to a dispute resolution procedure should know what is the case against him and should have an opportunity to meet it. In paragraph 17 of The Scheme for Construction Contracts it is provided in terms that "The adjudicator ....shall make available to [the parties] any information to be taken into account in reaching his decision". At one point in her oral submissions Miss Hannaford seemed to come close to relying upon the absence of an equivalent provision in clause 38A of the Sub-Contract as an indication that there was no similar requirement in relation to an adjudication governed by terms similar to those of the Sub-Contract. If and insofar as Mr. Hinchcliffe, or anyone else, may have thought that the effect of clause 38A.5.7 was that an adjudicator could, subject only to giving the parties to the relevant adjudication advance notice that he was going to seek technical or legal advice, obtain that advice and keep it to himself, not sharing the substance of it with the parties and affording them an opportunity to address it, it seems to me that he or she has fallen into fundamental error. It is absolutely essential, in my judgment, for an adjudicator, if he is to observe the rules of natural justice, to give the parties to the adjudication the chance to comment upon any material, from whatever source, including the knowledge or experience of the adjudicator himself, to which the adjudicator is minded to attribute significance in reaching his decision. Thus in the present case it was plain, in my judgment, that Mr. Hinchcliffe should not have had any regard to the final report of Mr. Adie without giving both RSL and Stansell the chance to consider the contents of that report and to comment upon it. If he needed an extension of the time allowed for his decision to enable him to provide the necessary chance, then he should have explained that to the parties in seeking their consent to an extension. If he had explained that he needed an extension in order to afford the parties an opportunity to comment upon Mr. Adie's final report, and the parties, with knowledge of the significance of the request for an extension, had not agreed to one, the likelihood is that they would be taken to have waived the right to object that they had not had the opportunity which they had refused. However, it is absurd to suggest that a party requested, for no definite reason, to agree to an extension of time for the making by an adjudicator of a decision, who refuses it should be precluded from resisting the enforcement of the decision on the ground that he had no opportunity to address an issue of importance in the ultimate result because there was no time,

if the deadline for the making of the decision without an extension was to be met, to give him the opportunity which he was denied.

33. A further aspect of the requirements of natural justice is that a party to a dispute resolution procedure has a legitimate expectation that he will be afforded opportunities promised to him to present his case. It seems to me to be quite plain, notwithstanding the submission of Miss Hannaford to the contrary, that in his letter dated 24 March 2003 Mr. Brydon was indicating the agreement of Stansell on terms to the employment of Mr. Adie, and not an unconditional consent accompanied by mere requests. It is immaterial whether, strictly, Mr. Hinchcliffe needed the agreement of the parties to the employment of Mr. Adie to assist him, because he chose to seek that agreement, whether strictly he needed it or not. While Mr. Hinchcliffe did not in terms agree expressly to the conditions set out in Mr. Brydon's letter dated 24 March 2003 as those subject to which Stansell would agree to the employment of Mr. Adie, he did, by the terms of his letter dated 8 April 2003 and by enclosing therewith the documents which he did, plainly, in my judgment, indicate that he would proceed in accordance with Mr. Brydon's requirements. The enclosures to the letter dated 8 April 2003 dealt with the first two of Mr. Brydon's conditions. Mr. Hinchcliffe reinforced the legitimacy of the expectations of Stansell by the terms of his letter dated 10 April 2003 and by the documents of which he enclosed copies with that letter. In informing both parties of the terms of the further communication which he had received from Mr. Adie he created the impression that he would share with them, and give them an opportunity to comment upon, any further communications from Mr. Adie. That Mr. Hinchcliffe did not do. I accept that it was apparent from the communications from Mr. Adie which Mr. Hinchcliffe did copy to Mr. Taplin and Mr. Brydon that there was likely to be at least a final report, but the parties could hardly anticipate what it was likely to say before it was produced. The need to provide an opportunity to Stansell to comment upon the final report was, as it seems to me, self-evidently the greater, if, in the final report, Mr. Adie significantly altered the position adopted in the initial report that the evidence was insufficient to make out any claim by one party against the other in respect of delay to the completion of the Sub-Contract Works.

34. It is, of course, correct that one does not know whether Mr. Adie in fact modified in his final report the position adopted in his initial report concerning which the parties were afforded the chance to comment. The probability must be that he did, because otherwise paragraphs 72 and 77 of the Decision would not have been phrased as they were. However, insofar as there may be any doubt as to the terms of Mr. Adie's final report, far from that being a reason to disregard the objection taken on behalf of Stansell, it brings into play another aspect of the rules of natural justice, justice being seen to be done. In my judgment the mere fact that the material before the Court indicates that Mr. Hinchcliffe took into account in reaching his decision in relation to extensions of time for completion of the Sub-Contract Works a report which may have been of importance in the eventual decision which was not disclosed to the parties to the adjudication is sufficient in itself to mean that Mr. Hinchcliffe's decision was reached in breach of the rules of natural justice and should not be enforced.

35. In the circumstances it is unnecessary for me to deal with the third reason urged upon me by Mr. Nissen as to why I should not enforce the decision of Mr. Hinchcliffe against Stansell. However, had it been important to the eventual outcome, I have to say that I am not persuaded from the material before me that Mr. Hinchcliffe did in fact simply adopt uncritically whatever conclusions Mr. Adie reached in his final report. It is plain from the terms of the Decision that Mr. Hinchcliffe considered those conclusions to be significant and that he had regard to them, but that falls a long way short of him delegating the actual decision in relation to extension of time to Mr. Adie. In the end the justification for drawing the inference that Mr. Hinchcliffe had delegated the relevant decision to Mr. Adie urged upon me by Mr. Nissen was the reference in paragraph 18 of the Decision to Mr. Adie making "findings" and the reference in paragraph 72 to the final report of Mr. Adie taking into account "the evidence given by the Parties following their review of Mr. Adie's preliminary findings". Those paragraphs might have been better phrased to avoid the risk of misunderstanding as to the actual role of Mr. Adie, but read in the context of the Decision as a whole, and in particular the rest of paragraphs 18 and 72 and paragraphs 77, 82 and 90, it does not seem to me appropriate to draw the inference for which Mr. Nissen contended.

36. It may be that it was in anticipation of the conclusion which I have in fact reached in relation to the objections taken to Mr. Hinchcliffe's decision on behalf of Stansell that it was decided on behalf of RSL to seek, as an alternative to summary judgment for the sum which Mr. Hinchcliffe determined to be due, an interim payment of some lesser sum. At all events, the way in which the matter of the interim payment was put on behalf of RSL was, in effect, that if I was satisfied that there was a proper objection to the part of the decision of Mr. Hinchcliffe which depended upon the contribution of Mr. Adie, Mr. Hinchcliffe had nonetheless determined other elements in RSL's Final Account claim in its favour, so I could, as it were, salvage from the wreckage those elements, valued at £60,045.45 (being the sum of £93,204.50 claimed in this action less the sum determined by Mr. Hinchcliffe in respect of loss and expense, £33,159.05, including Value Added Tax). Miss Hannaford also submitted that I could, and should, achieve the same result by awarding summary judgment for the sum which I found was actually due, if a sum lesser than £93,204.50.

37. In my judgment the alternative application for an interim payment made in this action, which in substance is a type of application frequently made as an alternative on behalf of beneficiaries of the decision of an adjudicator who are concerned as to the vulnerability of the decision, betrays a misconception as to the juridical nature of the decision of an adjudicator. The obligation on the part of those involved in an adjudication process to comply with or give effect to the decision is purely contractual. The decision of an adjudicator is not like an award of an arbitrator or the judgment of a court and directly enforceable. It is enforceable at all simply because by their contract the parties have agreed to comply with it or to give effect to it. This is so whether the parties have expressly agreed in their contract to a procedure for adjudication, as in the present case, or whether the relevant provisions of The Scheme for Construction Contracts have been implied into their contract by virtue of the provisions of Housing Grants, Construction and Regeneration Act 1996 s. 114(4). What, on proper construction of clause 38A.7 of the Sub-Contract, the parties agreed to do in the present case, in my judgment, was to be bound by and to comply with the decision of an adjudicator in relation to any dispute identified in a notice of adjudication which had been referred to him and which he had determined. In other words, taking as an example the circumstances of the present case, the dispute referred was as to how much was due to RSL in respect of its Final Account and the decision of Mr. Hinchcliffe in relation to that dispute was £93,204.50, after allowing for sums already paid. It is obviously conceptually possible for parties to an adjudication procedure to agree to be bound by, and to give effect to, not only the decision on the dispute referred, but also any decision on a constituent element in the eventual overall total, or any process of reasoning adopted in the course of reaching a conclusion on the overall dispute. Whether that has happened in any particular case will depend upon the proper construction of the relevant contract, but it has not happened in the present case. Thus once the decision as to the total amount to be paid has been successfully attacked, it cannot be said that any other amount has been determined by Mr. Hinchcliffe to be due in a way which is binding upon Stansell. In those circumstances the necessary foundation for giving judgment for some sum less than £93,204.50 or for the making of an order for an interim payment simply does not exist.

38. It is obviously also possible conceptually for more than one dispute to be referred to the same adjudicator on the same occasion and for him or her to deal with his or her decisions on the various disputes in a single document. In such a situation it may well be that a valid objection to the decision in relation to one dispute will not affect the validity and enforceability of the decision in relation to another. However, the submission of Miss Hannaford that any decision of an adjudicator to which a valid objection can be taken is "severable" so as to separate out those parts upon which the objection bites from those parts which are unaffected seems to me to be misconceived. That submission was not supported by any authority. Miss Hannaford did refer me to a rather casual comment of H.H. Judge Humphrey Lloyd Q.C. in Griffin v. Midas Homes Ltd. (2000) 78 Con LR 152 at page 159 that it did seem to him likely that it was possible to sever the decisions of an adjudicator as to two particular invoices from other matters which he had purported to decide, and to some observations of Lord MacFadyen in the unreported case of Homer Burgess Ltd. v. Chirex (Annan) Ltd. about the options open to him in the circumstances of that case under the relevant procedure in Scots law. Having

indicated that he considered one of the available options to be not enforcing the decision of the adjudicator at all on the ground that he had fallen into jurisdictional error, he went on:

"The alternative to my granting reduction was for me to hear submissions identifying that part of the adjudicator's decision that was within his jurisdiction, and enforce it to that extent only, by granting decree for payment in the pursuer's favour restricted to the sum reflecting the intra vires part of the decision.

In my view either of the two suggested courses would be competent. It would, in my view, be open to me to regard the adjudicator's error as to the scope of his jurisdiction as undermining the validity of his decision as a whole, despite there being parts of it that might have been made to the same effect if he had not erred as to his jurisdiction. It would therefore be open to me to reduce the whole of the adjudicator's decision. Alternatively, it would in my view be open to me to approach the matter from the pursuers' rather than the defenders' point of view, ask myself to what extent the decision was intra vires, and grant decree for payment enforcing that part of the decision that was valid and could properly be given the statutory temporary effect."

What he seems actually to have decided to do was to remit the decision to the adjudicator for reconsideration in the light of the decision of the court. The options which Lord MacFadyen was considering in the passage to which my attention was drawn must, I think, depend upon the detail of the procedure available in Scots law for challenging the decision of an adjudicator, as to which my knowledge is very limited. From the perspective of English law it would seem that either a decision of an adjudicator is wholly unenforceable, in which case no part of it can be enforced, or it is enforceable in part, in which case the party in whose favour the enforceable parts were determined has a right to enforce them. It is difficult to see any circumstances in which the court has a free choice either to find that the decision is wholly unenforceable or to decide that it is enforceable in part.

39. In the result both the application before the Court for summary judgment or an interim payment and the action fail and are dismissed.

Sarah Hannaford (instructed by Davies and Partners for the Claimant)

Alexander Nissen (instructed by Masons for the Defendant)