Before Morritt (Sir Andrew) VC : Gibson LJ Peter. C.A. 4th September 2003.

JUDGMENT : SIR ANDREW MORRITT VC.

1 This is an application by RSL (South West) Ltd for permission to appeal from the order of His Honour Judge Seymour sitting in the Technology & Construction Court made on 16 June 2003. By that judgment he dismissed the application of RSL for summary judgment, or alternatively an interim payment based on an adjudication award. The facts underlying the disputes are shortly as follows.

2. On 8 September 2000 RSL entered into a sub-contract with Stansell Ltd, the defendant, for the supply and erection of structural steel at a site in Bristol. Clause 38 of that contract provided for the resolution of disputes by a number of different means, one of which, as set out in Clause 38A, is by adjudication pursuant to section 108 of the Housing Grants Construction and Regeneration Act 1996. In particular, 38A.5.5 provides that:

"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'...

.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:

Then in 38A.5.7 it is provided that:

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

.2 The Parties shall, without prejudice to their other rights under the Contract, comply with the decisions of the Adjudicator; a n d the Contractor and the Sub Contractor shall ensure that the decisions of the Adjudicator are given affect.

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 seem such compliance pending any final determination of the referred dispute or difference pursuant to Clause 38A.7.1.

3. On or before 28 January 2003 RSL submitted a final account for a total sum of £417,000-odd of w hich Stansell admitted and paid about £302,000.

4. On 3 March 2003 RSL gave a notice of adjudication and in due course a Mr Hinchcliffe was appointed the adjudicator. The adjudicator required and was provided with pleadings in the form of a defence and r rebuttal.

5. On 19 March 2003 Mr Hinchcliffe notified the parties that, in respect of a delay or timing issue, it was his intention to employ a Mr Adie to assist him in relation to those issues. Neither party objected to that proposal but Mr Brydon, on behalf of Stansell, stipulated certain terms with which Mr Hinchcliffe never formally disagreed, one of which was the provision to his client of the findings of Mr Adie and the opportunity to comment on them.

6. There was a meeting between the parties and the adjudicator on 11 April and the adjudication was completed on 19 April when Mr Hinchcliffe gave his award that Stansell should pay RSL within seven days the sum of £93,204, being £381,000-odd plus VAT less the sum already paid of £302,000-odd. With regard to the participation of Mr Adie, Mr Hinchcliffe said (paragraph 18 of the decision):

"With the Parties' approval Mr M Adie ...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.

His decision, as set out at page 58, comprises some seven lines of computations and a final total. The computations are undisputed in relation to lines 1 and 2. The dispute arises in respect of the loss and expense claim. In that respect the adjudicator added to the contract sum an amount of £28,000-odd, That was an issue in respect of which Mr Adie's advice had been sought.

7. On receipt of the decision Mr Brydon on behalf of Stansell wrote to Mr Hinchcliffe complaining that he and his client had not been given the final report or any opportunity to comment on it. On that basis his client declined to comply with the adjudication award, and on 1 May 2003 these proceedings were instituted by a claim form seeking payment of the amount of the award followed by an application for summary judgment and/or an order for interim payment of that or some lesser sum.

8. The witness statement of Mr Brydon in opposition to the summary judgment application drew attention to the fact that Mr Hinchcliffe failed to give Stansell an opportunity to comment on the final report of Mr Adie, and he contended that that was a breach of natural justice, which entitled his client to refuse to observe the award.

9. That dispute came before Judge Seymour, and he dismissed the application for summary judgment and for an interim payment, I quote two passages from his judgment. The first is paragraph 32, where he said:

   "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."

   That he held had not been done in that case and therefore the award was not enforced because of it. There is no appeal in respect of that part of his decision. At paragraph 37 on page 74 he said this:

   "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."

10. On this application RSL contends that the issue to be determined by the Court of Appeal is an important issue arising on adjudicator's awards in general, and it is this. If and to the extent the final sum is open to challenge because of want of jurisdiction or failure to observe the rules of natural justice (being the two grounds for avoiding the enforcing such awards) and if the award is itself susceptible of severance so some sum can be seen to be due irrespective of that issue, can the court nevertheless enforce the award to that extent? He submits that two decisions at the same level as Judge Seymour suggest it can be so severed, and that Judge Seymour was wrong in saying either it could not, or in this case it could not. He submit that this is an important issue which should be determined by the Court of Appeal.

11. By contrast counsel for Stansell submits that the judge correctly observed that this was not a case in which there could be any ready severance because the delay issue went to a counterclaim as well as the claim made by RSL which would go to reduce the amount of any final account. He pointed to the wording of the requirement in the contract and asked the question rhetorically: how, in the light of the fact that it is accepted that the final account cannot be enforced in full, can the court come to the conclusion that there is a final account for any lesser sum?

12. I do not for my part minimise the force of the argument in opposition to those of the applicant. It does seem to me, however, that it is appropriate for this matter to be considered generally by this court after hearing substantive argument on both sides in order to determine the extent to which, if at all, an adjudication is capable of being severed, and in so far as severed is capable of being separately enforced. This is a point of some importance which should be determined by this court.

13. For those reasons I would grant permission to appeal.

14. LORD JUSTICE PETER GIBSON: I agree.

(Application granted; costs to be costs in the appeal).