



Talking the Walk

With over 60 years combined construction industry experience, ADA founders Bob Davis and Dave Armstrong along with Senior Consultant Richard Senior are often requested to speak at various industry events, so it came as no real surprise when Newcastle University recently came knocking on their door in search of their assistance.

Working in concert with the Universities of Durham and Warwick, Newcastle University is delivering an MSc course in Major Projects Management, which is currently being attended by around 20 experienced project managers drawn from various industries including rail, defence and oil and gas processing. Using their knowledge and experience, Bob and Dave are running a number of sessions which look in depth at issues arising from major projects in which they have been involved. The particular emphasis is on the effects of change and how to deal with its consequences.

"We are both delighted to be able to share the benefits of our experiences in this way," said Bob, who is no stranger to the lecture theatre.

The Engineering Design Centre (EDC) of Newcastle University is also involved in a major programme with the Thales Group and Augusta Westland to develop further their expertise in the management of major projects. As part of this initiative a series of seminars is being provided to which Armstrong Davis were invited to contribute.

Prof Paul Braiden (Director, EDC) said "We were delighted to be able to involve Armstrong Davis in this. They have wide experience in the field and their contribution was very highly rated by the delegates. We hope to be able to involve them in more activities of this kind."

ADA PROVIDES SUPPORT ON HEAVY LIFT VESSEL UPGRADE PROJECT

ADA is currently involved in providing support to Malta Shipyards Limited (MSL) as it embarks on the first of two vessel upgrade projects on behalf of Fairmount Heavy Transport, a major heavy-lift transport company.

Senior ADA Consultant Ian Burnell and Director Dave Armstrong are currently providing support to MSL's Project and Corporate Management teams as they set about upgrading the Fairmount Fjord into a self propelled heavy lift vessel for use in the Oil and Gas sector. The support includes input with respect to client contractual matters and variation work, together with subcontractor contract management.

"ADA involvement with MSL started some years ago, so the quality and expertise that ADA can bring to projects like these was witnessed while they were working in our yards on behalf of a number of our other clients," said MSL's Chief Executive, Chris Bell.

"The direct relationship started with another

MSL project, so it was a logical move to seek their specialist support and assistance once we had secured these two major contracts from Fairmount."

"This is not the only project that ADA is working on for MSL and we sincerely hope that the Framework Agreement that we have established will lead to further significant work in the future," said Dave Armstrong.

Work on the project is currently ongoing, and it is envisaged that other members of the ADA team will become involved as the project progresses.

As part of a longer term project, ADA is also developing a training programme with MSL such that ADA can work with MSL's shipyard management team as part of a technology transfer scheme focused on the development of their in-house skills.

adjudication - Does One Size Fit All?



Andrew Milburn

Many within the Construction Industry are asking, "Is the process of adjudication a suitable forum to effectively deal with both simple and complex disputes?" In this article, ADA Consultant Andrew Milburn discusses some of the issues.

In May 1998 the Housing Grants Construction and Regeneration Act 1996 (The Act) was introduced. The Act was based on the recommendations of Sir Michael Latham in the 1994 Latham Report 'Constructing the Team'. Its objective was to provide the construction industry with a process that would allow parties to obtain an interim decision on a matter that would be final and binding if the parties so wished or that could be finally determined in litigation or arbitration at a later date. The purpose of an interim decision was to maintain cash flow, something Latham considered was the lifeblood of the Construction Industry.

Adjudication was introduced on a "one size fits all" basis, enabling simple and complex disputes alike to be referred to adjudication. My view is that it was ill equipped to deal with complex disputes but, as we have seen in the interim, nothing has prevented its use for such disputes.

Through time, we have seen that the

Judiciary has largely backed adjudication, with few questions being raised over its suitability in complex disputes, one exception perhaps being in *William Verry-v-Furlong Homes*, with adjudication fulfilling the following objectives:

- To be a provisional/interim decision making process which could then be finally decided in Arbitration or Litigation at a later date.
- To produce a cash flow remedy as described by Latham in the Latham Report 1994.
- To be implemented during the progress of the project and not after practical completion.
- It was not intended to replace litigation or arbitration as an ultimate method of resolving construction disputes.

The Judiciary has supported the process of adjudication and accepted that it is a quick dispute resolution process, albeit not always with one voice. There is reference in *Birse-v-CIB* and *Whitefriars-v-Amec* complaining about the cost and time required, and in *Birse*, John Uff's fee is recorded at £200k, which raised some disquiet.

In contrast to the above, John Uff (2005), in *Construction Law Journal* reference 21(1) 3-10 in an article titled '100 Day Arbitration: Is the Construction Industry Ready for It', raises concerns over the suitability of adjudication to all disputes, particularly complex matters.

Also, in 2005, the Technology and Construction Court heard a case regarding *William Verry and Furlong Homes* which was a final account dispute involving variations, extensions of time, loss and expense and liquidated damages. HHJ Coulson QC described the adjudication as "kitchen sink, final account adjudication".

In summing up, HHJ Coulson QC highlighted the following point: "Whilst such adjudications are not expressly prohibited by the Housing Grants, Construction and Regeneration Act 1996 as it presently stands, there is little doubt that composite and complex disputes such as this cannot be accommodated within the summary procedure of adjudication".

This statement made by HHJ Coulson QC can be analysed in two parts, 'The Theory' and 'The Practice'.

Firstly, the Theory of the Act was for it to accommodate all disputes arising under a construction contract of whatever complexity.

In the second part of his statement, HHJ Coulson QC refers to adjudication in 'Practice' and raises concerns as to whether one size really does fit all.

This concern was also voiced by the Judiciary in the case of *London and Amsterdam Properties Limited-v-Waterman Partnership Limited* (2003), where issues of natural justice were raised. The Presiding Judge commented that even when an Adjudicator was prepared to exercise the powers vested in him by the Statutory Adjudication process, there may be some cases in which the complexity of the case and or/conduct of a claimant prevents a case from being adjudicated fairly and impartially, as a result of the imposed timetable and other constraints. It was at this point that HHJ Wilcox suggested that a review as to the working of the Act in practice was perhaps timely, which is underway but does not deal with this point.

The comments by HHJ Wilcox in the above case ignited the debate regarding the suitability of adjudication in complex construction disputes. Peter Sheridan and Dominic Helps (2003) in their *Construction Act Review* found in *Construction Law Journal* reference 19(5), 268-282 do not accept this view, suggesting that the learned Judge's approach appears to ignore the wording of the Act. This states that any dispute (of whatever complexity) that arises under a construction contract can be referred to adjudication at any time. Sheridan and Helps go further, suggesting that had Parliament intended to limit the use of the Act to simple disputes, then the Act would have said so.

Even before the introduction of The Act in 1998, Peter Sheridan, in his article 'English Statutory Adjudication: An assault on the

Contractual Freedom in the Construction Industry,' voiced his concerns over the introduction of Statutory Adjudication, making the following observations:

"...some disputes are far too complex and important for that type of quick fix for which the statutory adjudication is designed. The statute provides for decisions within 28 days of appointment, which has its attractions for straightforward payment disputes but is hopelessly inadequate for, say, a delay and disruption claim or a dispute concerning negligent design. Complex disputes are normal in construction, and are not amenable to quick-fix."

Therefore, Peter Sheridan, even without the benefit of case law, identified that some disputes did not favour the "rough and ready" approach of statutory adjudication. But this is not what is happening in reality.

Sheridan and Helps clearly support The Theory of Adjudication and substantiate their argument by referring to the actual wording of the Act, which reflects Parliament's intention at the time of drafting. It is very difficult to

dispute the wording of The Act, as there are no express provisions to exclude complex disputes from the adjudication process.

Adding to the debate, HHJ Toulmin in 2004 in the case of AWG Construction Services Ltd-v-Rockingham Motor Speedway Ltd. supports the comments of HHJ Wilcox and introduces a further concept: that of a possible conflict between the principles of natural justice and the rough and ready nature of the adjudication procedure. HHJ Toulmin concentrated on the development of adjudication since its introduction through to present day, describing it as a completely different process to that implemented by Parliament in 1998. The initial process was designed to achieve a quick, easy and cheap answer. However, HHJ Toulmin considered that adjudication had now developed into an expensive, elaborate and confrontational process i.e. an adversarial one.

HHJ Toulmin suggested that whilst it was unlikely that a challenge to an adjudicators' decision would be successful on the basis that the case referred was 'too complicated'. He felt that a challenge on the basis of a

breach of natural justice through time constraints due to the complexity of the case may be successful.

It seems that growing disquiet within the Judiciary, based on case law, is moving towards the view that a review of the working Act may be appropriate. It is underway, but is not dealing with this element.

This is not an open and shut case: the debate is set to continue with cases being referred to adjudication becoming increasingly complex.

For the time being, the Theory behind the introduction of adjudication prevails, as there are no immediate legislative changes on the horizon. One size continues, for now, to fit all.

Adjudicators can therefore look forward to more of the same: complex disputes involving a catalogue of issues such as loss and expense, variations and extensions of time and rapid timescales in which to resolve them.

The debate goes on!!!

Bobber Jobber

The quest for alternative renewable sources of energy is gathering pace. Wind, solar power and hydrogen fuel cells are all featuring prominently in the global debate. However, one area that is showing real promise is the generation of electricity from the movement of waves, and ADA is particularly pleased to be providing support to a major new wave energy project.

The University of Manchester, University of Manchester Intellectual Property Ltd. (UMIP) and industrial partners ODE, Royal Haskoning, ABB LV Motors, Renold Chains, Bridon International and Renold Gears are developing and commercialising an innovative and patented wave energy device which has been euphemistically termed the Manchester Bobber (www.manchesterbobber.com).

The ultimate commercial vision of the project is a large number of full scale platforms, located in 30m to 60m of water (initially) each comprising an array of floats (25 to 50) independently generating electricity which is supplied to the grid cost effectively. A standalone company/commercial partnership will eventually provide the technology to enable commercial production of such a renewable electricity system and generation of electricity at a competitive price.

The initial testing of the wave energy device commenced in January 2004 with a 12 month Carbon Trust award. Design, development and testing of a 1/100th scale working device in parallel with the development of a computational model were successfully completed. At the same time UMIP implemented protection of the intellectual property and assisted in a

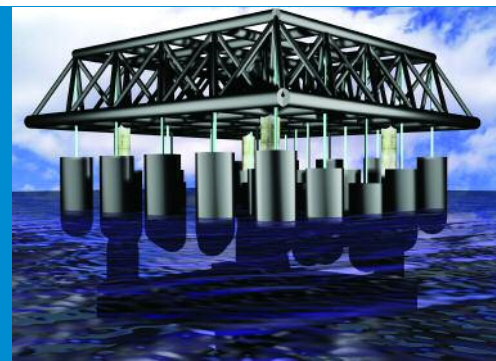
Photo courtesy of
Royal Haskoning

second round of Carbon Trust funding. This was subsequently awarded in collaboration with project partners Mowlem plc (acquired by Carillion) and Royal Haskoning.

A second tranche of Carbon Trust funding enabled the Manchester Bobber partners to carry out a 6 month programme of work using a 1/10th scale model of the Manchester Bobber at NaREC's facility in Blyth. ADA is currently assisting the project to bid for funding that will enable the project to undertake the testing of a single full scale prototype unit probably off the coast of the Orkneys.

Full scale platform design cost estimates and extrapolated modelling of the Bobber's electrical outputs using a refined computational model developed during the first and second phase has given confidence that this is a truly cost competitive technology.

"ADA is part of the Manchester Bobber consortium," said UMIP's Frank Allison. "As a key partner they have provided off-shore expertise and contacts in the off-shore industry which has enabled the technology to move closer towards commercialisation."



Bob Davis appointed Chairman of Adjudication Society

Bob Davis has been elected as Chairman of the Adjudication Society. He was elected at the Society's AGM held in November after serving as Vice Chairman for 2 years.

"As well as being the titular head of the Society, my role will be to manage the affairs of the Society and to establish a programme to achieve its objectives," said Bob, who is also a practicing Adjudicator, Arbitrator and Mediator.

"I am delighted to have been given this opportunity to contribute to the development of the Society as it strives to encourage and develop adjudication as a method of resolving construction disputes."

Bob was also the first Regional Board Chairman of the Royal Institution of

Chartered Surveyors in Yorkshire after the implementation of Agenda for Change.

The Adjudication Society is a not-for-profit Society promoting resolution of construction disputes by means of adjudication.

It was formed so that the construction industry might benefit from the body of experience and case law associated with the introduction of the Housing Grants, Construction and Regeneration Act 1996, the growth in adjudication by means of Expert Determination and Dispute Boards and the increasing popularity of the New Engineering Contract.



Bob Davis Executive Director

ada strengthens Leeds team



Damian Wilkinson Senior Consultant

January saw the arrival of Damian Wilkinson who has been appointed to the position of Senior Consultant, further strengthening the team operating from ADA's Leeds office.

Damian holds both a BSc (Hons) in Quantity Surveying (First Class) and an MSC in Construction Law and Arbitration and is a Member of the Royal Institution of Chartered Surveyors and of the Chartered Institute of Arbitrators.

He is a highly effective manager and consultant specialising in procurement, contract advice and risk management for major projects, bringing with him a wealth of experienced gained

from his involvement in the Construction, Engineering and Technology sectors both here in the UK and overseas. On a practical front, Damian is well versed in the use of most major project forms including JCT, ICE, NEC, MF/1 and IChemE.

An accomplished forensic quantity surveyor, Damian is also highly experienced in the application of conflict avoidance techniques in support of the early settlement of final accounts and quantum claims. This includes extensive experience in dealing with the resolution of complex arguments presented by employers, contractors and suppliers.

Damian has advised on

numerous new build and refurbishment projects in the education, commercial property, civil engineering, power, transport and information technology sectors. He has acted as Expert Advisor on numerous disputes, working alongside Legal Advisors, and is an accomplished strategic advisor and change manager.

"We are absolutely delighted that someone of Damian's stature has agreed to join us," said ADA Director, Bob Davis. "His appointment will both strengthen our dispute avoidance and resolution capabilities and will contribute to our on-going drive to improve the quality of service that we offer to both existing and potential clients."



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