armstrong davis associates

One stop shop – Complex disputes and adjudication

Robert J. Davis MSc FRICS FCIArb

Featured in Construction Law Review 2005

In May 1998, the *Housing Grants Construction and Regeneration Act* 1996[1] (the Act) was enacted. The Act was introduced accommodating the recommendations of Sir Michael Latham in the 1994 Latham report *constructing the Team*. The principal underpinning the Act was to provide the construction industry with a process that would allow parties to obtain an interim decision on a disputed matter that would be final and binding if the parties so wish 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 within the industry, which Latham considered to be the lifeblood of the construction industry.

The Act was drafted on the basis that 'one size fits all', therefore allowing relatively simple or complex disputes to be referred to adjudication.

The judiciary appears to be firing a cautionary shot across the bow of the construction industry, suggesting that in certain circumstances complex disputes do not have a place within adjudication.

In sharp contrast to the above, John Uff, in an article entitled *100 Day Arbitration: Is the Construction Industry Ready for it*[2], raises concerns over the suitability of adjudication for all disputes (my emphasis) including complex matters. This view was also expressed by HHJ Peter Coulson QC of the Technology and Construction Court in a case, *William Verry (Glazing Systems) Ltd* v *Furlong Homes Ltd*[3]. In this case, the matters I referred to adjudication, for which the adjudicator was required to reach a decision in 42 days, included disputed variations, extensions of time, loss and expense and liquidated damages, disputes do not have a place effectively a final account dispute.

HHJ Peter Coulson QC described the adjudication as follows:

> *"It was, to use the vernacular, "a kitchen sink" final account adjudication."*

The judiciary, in this particular instance, appears to be firing a cautionary shot across the bow of the construction industry, suggesting that in certain circumstances complex disputes do not have a place within adjudication. HHJ Peter Coulson QC comments:

> *"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."*

The above identifies a potential divergence between the intentions of the Act being 'one size fits all' and the present view of the judiciary.

Therefore the question arises; is adjudication in its current form under the Act the correct dispute resolution forum for complex disputes and should the consultation on proposals to amend part II of the Act and *Scheme for Construction Contracts (England and Wales) Regulations* 1998, carried out jointly by the Department of Trade and Industry and the Welsh Assembly, address the issues highlighted by the judiciary?

© 2005-2008 Armstrong Davis Associates Ltd.

The conventional perception of how adjudication was intended to operate can be described as follows; it was intended to be a provisional/interim decision making process which could be finally decided in arbitration or litigation at a later date. Adjudication was designed to produce a cashflow remedy for the construction industry. Adjudication was to be implemented during the progress of the project and not after practical completion and, finally, it was not intended to replace litigation or arbitration as an ultimate method of resolving construction disputes.

This conventional approach was supported by HHJ Lloyd in the case of *Herschel Engineering Ltd* v *Breen Property Ltd* [no 2][4] in which HHJ Lloyd commented as follows:

> *"Parliament wanted adjudication to deal swiftly with problems as they arose during the course of the contract and which were not or could not be solved quickly by discussion ... but could be resolved by the adjudicator so that the parties could get on with the contract."*

The judiciary clearly supported the process of adjudication and accepted that it was a quick dispute resolution process and "*that the adjudicator is to conduct proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by parliament permit.*"[5] However, the tide turned when HHJ Wilcox in London *Amsterdam Properties Ltd* v *Waterman Partnership Ltd*[6] raised the issue of natural justice explaining that even when an adjudicator was prepared to firmly and impartially exercise the powers vested in him by statutory adjudication process, there may be some cases in which the complexity of the case and or/conduct of a claimant prevent a case from being adjudicated fairly and impartially, given the timetable and other constraints. HHJ Wilcox concluded:

> *"A review as to the working of the Act in practice is perhaps now timely."*

Sheridan and Helps response to HHJ Wilcox can be found in the article entitled *Construction Act Review*[7], in which they do not accept the comments of HHJ Wilcox suggesting that the learned judge's approach appears to ignore the wording of the Act which allows *any dispute* (my emphasis) that arises under a construction contract to be referred to adjudication at any time. Sheridan and Helps also suggest that had Parliament intended to limit the use of the Act to simple disputes, then the Act would have said so.

…the initial process was a way of achieving a quick, easy and cheap answer which had developed over time to becoming expensive, elaborate and confrontational in nature.

Despite Sheridan and Helps view of the application of the Act to all disputes arising under a construction contract, complex or otherwise, Judge Toulmin in the case of *AWG Construction Services Ltd* v *Rockingham Motor Speedway Ltd*[8] supports the comments of Judge Wilcox, by suggesting that there may be a conflict between the principles of natural justice and the rough and ready nature of the adjudication procedure. Toulmin described the adjudication process (present day) as a completely different process to that implemented by Parliament in 1998, describing that the initial process was a way of achieving a quick, easy and cheap answer which had developed over time to becoming expensive, elaborate and confrontational in nature. Toulmin does not consider a challenge to an adjudicator's decision would succeed if the case referred was described as 'too complicated' however a challenge on the basis of a breach of natural justice through time constraints due to the complexity of the case may carry more credibility.

© 2005-2008 Armstrong Davis Associates Ltd.

Clearly the judiciaries are unhappy with the extent of a dispute that can be referred to adjudication, however the sentiment of the Act is maintained, that 'one size fits all'.

Even before the introduction of the Act in 1998, Sheridan" commented on 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."*

Sheridan therefore, even without the benefit of case law, identified that some disputes did not favour the rough and ready approach of statutory adjudication.

Clearly the process of adjudication and whether it can accommodate complex disputes has been debated since the introduction of adjudication, with the principles of the Act being maintained, i.e. one size fits all, compared to the comments from the judiciary, whose view has become increasingly skeptical as the disputes referred to adjudication become increasingly complex.

The future

Many reservations regarding the Act and the process of adjudication have been expressed since 1998, yet despite the recent high profile commentaries made, regarding the issue of complex disputes in adjudication, there appears to be little by way of action towards addressing the reservations held by the judiciary and others.

Caution is needed as radical change to the Act and process of adjudication, to address purely a perception by various commentators that complex disputes cannot be accommodated in adjudication, is unchartered territory. Changes, without considerable thought and foresight, may generate a whole new set of problems for adjudication in the future.

Adjudication is constantly developing and although it is not without its problems, adjudication as a forum for resolving construction disputes is effective and it works, therefore we must ask the question; why change something that's not broken?

Bob Davis, Armstrong Davis. This is a summary of my opinion for the purpose of this particular paper and will not necessarily be that applied to any specific circumstance. It should not be quoted or relied upon in any particular adjudication involving any adjudicator or the author.

1 *Housing Grants Construction and Regeneration Act 1996 (HGCRA)*
2 *Uff, J (2005) 1OO-Day Arbitration: Is the Construction Industry Ready For It, Const. LJ, 21 (1), 3-10*
3 *William Verry (Glazing Systems) Ltd v Furlong Homes Ltd [2005] EWHC 138 (TCC)*
4 *Herschel Engineering Ltd v Breen Property Ltd (2000) BLR 272*
5 *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd (2001) BLR 207*
6 *London Amsterdam Properties v Waterman Partnership Ltd (2003) EWHC 3059 (TCC)*
7 *Sheridan, P and Helps, D (2003) Construction Act Review, Const. LJ, 2003, 19(5), 268-282*
8 *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd (2003) EWHC 888 (TCC)*
9 *Sheridan, P (1998) English Statutory Adjudication: An Assault on the Contractual Freedom in the Construction Industry, Int. A L R 1998, 1 (3), 108-114*

© 2005-2008 Armstrong Davis Associates Ltd.

Armstrong Davis Associates - a global specialist in dispute avoidance, dispute resolution together with complementary commercial services to the construction, energy, oil, gas and petrochemical industries.

Robert J. Davis
Bob is Joint Principle and Executive Director of ADA. He has over 30 years of experience in construction and engineering. A practicing Adjudicator, Arbitrator, Mediator and Expert Witness, he has an M.Sc in Construction Law and Arbitration and is a Fellow of the RICS and the CIArb.

© 2005-2008 Armstrong Davis Associates Ltd.

armstrong davis associates

Stokesley Office

Millennium Court • Stokesley Business Park

Ellerbeck Way • Stokesley • North Yorkshire • TS9 5JZ • UK

tel: +44 (0) 1642 714 555 • **fax:** +44 (0) 1642 714 592

Leeds Office

4310 Park Approach • Thorpe Business Park

Leeds • LS15 8GB • UK

tel: +44 (0) 113 260 9733 • **fax:** +44 (0) 113 260 3029

email: general@armstrongdavis.co.uk

www.armstrongdavis.co.uk