SPEECH TO THE ANNUAL DINNER OF THE SOCIETY OF CONSTRUCTION LAW: 15th May 2002

Graham Watts

The Society is a much valued associate member of the Construction Industry Council (CIC) and it is always a great pleasure to get out to speak to some of the 400,000 people that comprise the membership of the 55 organisations which form CIC. I suspect that in the past ten years, I may have managed to meet or speak to something like half a percent of these people, so thank you for allowing me to bump my average up.

Secondly, this is a repeat performance. I last spoke to this Annual Dinner on 7th May 1997 – it was just a few days after the general election which swept Tony Blair into Downing Street. Much of my work at CIC concerns the representation of the construction industry to Government – one hesitates to use the word 'lobbying' these days because the term is so stigmatised by cash for questions and sleaze. It was natural therefore for my speech in May 1997 to focus on a few predictions about the likely effects of a Labour Government on the construction industry. But you will be pleased to hear that I plan to say nothing more on that particular subject! It strikes me that there is nothing useful or interesting to say which is not being said elsewhere on a daily basis.

More importantly, I think that I agree with that great footballing philosopher, Paul Gascoigne, on the subject of predictions. When asked recently about his chances of being selected for Sven's team in the World Cup, Paul replied: 'I don't make predictions and I never will!'

So instead of discussing politics I thought that I would spend a few minutes explaining some of the things that CIC is doing, which I believe will be of interest to SCL members.

Adjudication

Top of my list is adjudication.

Three of my predictions from five years ago were that:

- Nick Raynsford would become a very distinguished Construction Minister;
- implementing the Scheme for Construction Contracts in early 1998 would be at the top of his first Ministerial box; and
- adjudication would become widely-used.

Review of the 1996 Act

These were all fairly 'safe bets' but I would not have predicted that Nick would 'buy off' some last minute controversy over the Scheme by offering a review after just two years, nor that he would actually go through with undertaking such a review. The interesting codicil to this is that when the two years had gone by and the industry reminded civil servants of the promised review, no-one could actually remember or find reference to when, where and how the Minister had delivered the promise. However, despite this lack of evidence, Nick Raynsford made good his promise and asked the Construction Industry Board (CIB) to carry out a review of the effectiveness of the adjudication provisions. The CIB delivered its report to the Minister just before Christmas 2000.

In response, the Minister agreed that there might be one or two things that could be put right by amendments to the Scheme, but that in general, the legislation was working. On the other hand he felt that adjudicators needed more and better guidance and that there should be an agreed standard or benchmark for the training and qualification of adjudicators. So, he challenged the CIB to do these things.

Unfortunately, for reasons that would require a speech of their own, the CIB did not live long enough to pick up Nick Raynsford's challenge. However, the five construction umbrella bodies which made up the CIB (including the CIC) agreed to keep this work going through the Construction Umbrella Bodies Adjudication Task Group.

The Group has met ten times since early 2001 and the DTI has energetically participated in our meetings. In fact, it has been the very model of industry/government co-operation and consultation. We have completed our work on the *Guidance for Adjudicators*, which is an excellent document that should become an indispensable and concise guide for every adjudicator. We are now well on the way to producing *Guidance for the Users of Adjudication*.

Chris Dancaster led a subgroup which looked at the whole issue of training adjudicators and its recommendations about the standards for training, assessment and qualification have been accepted by the main group. Very soon, every Adjudicator Nominating Body will receive a joint letter from the DTI and industry asking them to commit to this benchmark – I know that many of them already do – and I anticipate that thereafter we will have a Charter or Memorandum of Agreement that commits the ANBs to maintaining and supporting these standards.

The *Guidance for Adjudicators* has essentially been ready since the end of last year but we took the understandable decision to delay publication until the amendments to the Scheme had been made by Parliament. Some of you may recall the DETR consultation on *Improving Adjudication in the Construction Industry* which took place about a year ago. We are, of course, still waiting for an outcome to that process.

Obviously amendments to the Act and Scheme are matters for Parliament to decide and I have already excused myself from making too many predictions; however, I think I can safely say that many of the ideas that surfaced as potential improvements to the Scheme during the review and consultation have now been effectively ruled out by the DTI.

I suspect therefore that the only amendments that are likely will concern the issue which so motivated Nick Raynsford when he asked for the review, and that is costs.

In effect, there are three costs issues:

- to outlaw contractual provisions that provide that in any event one party should pay both (or all) parties costs;
- to provide that the adjudicator does not have the power to award the parties costs; and
- to provide that a court or arbitral tribunal should not be able to open up the question of the parties' costs in the adjudication.

These are issues that the whole industry feels strongly about and I believe that the DTI is sympathetic to our case. At least two of the three issues require amendment to the Act as well as the Scheme, and it would be understandable if the DTI needs to wait until amendments to both can be carried out concurrently.

Amending the provisions of the Act is clearly a more difficult proposition than amending the Scheme. It might be carried out (possibly) by utilising section 114 of the 1996 Act, which empowers the Minister to make the Scheme by separate regulation, or by utilising deregulation legislation; or (the most likely course) through tacking the amendment onto another piece of primary legislation.

Personally, I do not hold out much hope for the Football (Disorder) (Amendment) and Costs of Adjudication Act 2002 or any of the other possible 30 or so permutations involving government legislation currently in progress. At the moment, we are still holding our breath for amendments to be made before the summer recess in July but we have to accept that this is not grasping the attention of those who make these decisions.

So the Group has decided to publish the *Guidance to Adjudicators* in July, come what may in Parliament by then. It will be printed and available on the web and it is likely to be free to adjudicators registered with an ANB (although please do not quote me on this, because the decision has still to be agreed formally). If necessary, we will produce a second edition following amendment of the Scheme and/or the Act in due course.

Writing in *Building* last week, Dominic Helps warns us that adjudication is at a crossroads and that appeal judges have given it a rough ride recently.

Speaking from my perspective as an industry representative, we need to be clear about a few key things:

- the industry likes adjudication;
- by and large the legislation is working surprisingly well; and
- from a standing start, much is now being done to improve the training and guidance for adjudicators.

I agree with Dominic Helps and hope that the judges will not make judgments which frustrate the wishes of industry and the will of Parliament.

Survey of adjudicators

Has it been as great a success as the politicians and civil servants would have us believe or, as Ann Minogue wrote in *Building* recently has it 'increased disputes, failed to deal with complex cases and become prey to bully-boy tactics'?

Earlier this year, CIC carried out the most comprehensive survey of adjudicators yet mounted. We had tremendous co-operation from the Adjudicator Nominating Bodies, from which we were able to identify that there were 666 *separate* people registered as adjudicators with the ANBs, as at 30th September 2001 (many of these people were on more than one list with the average being 1.7 lists each).

We were pleased to get responses from 302 adjudicators – just over 45% of the total sample, an unusually high response for any survey. However, the respondent adjudicators were more active than the average. A detailed analysis of the responses against the data supplied by ANBs enabled us to verify that the survey covered 62% of the adjudication appointments made between May 1998 and September 2001.

CIC has not yet published the results but I am able to give you an early indication of some of the headline data and the conclusions that we are drawing from the survey. In the period between the implementation of the Act on 1st May 1998 and 30th September 2001, appointments were made for 4,707 adjudications, of which 3,475 progressed to the point of a decision (the remainder being withdrawn or settled at an earlier stage). There is a rising trend in the number of adjudications per month, and this reached a peak in the last month of the survey.

Nearly 60% of decisions are made in less than 30 hours, and in only around 2% of cases did it take more than 100 hours for the adjudicator to reach a decision. The adjudicators were, on average, employed on adjudication for 15% of the time that they had available for this work. So, despite the escalation in the demand for their services, we are able to see that the current adjudicators have ample capacity to meet the demands of the industry. The data also infers that there will be spare capacity for some time into the future unless current trends are greatly increased.

This is one area where I take issue with Ann Minogue's view that there are a lot of adjudications and it has somehow increased the amount of formal dispute in the industry. This is a massive industry with millions of contracts being entered into each year. At present, only a tiny proportion of the parties to these contracts are availing themselves of this quick, cheap and immediate form of dispute resolution.

If adjudication does 'catch on' and we see a quantum leap in the number of adjudications rather than the current steady growth, then the available resource of adjudicators – particularly well-trained and experienced ones – could rapidly come under pressure.

However, today's problem is quite the opposite. One of the conclusions of our survey is that there are on ANB lists many adjudicators who are actually gaining very little experience of adjudicating. Where we may have reasonably assumed that those trained initially would quickly become effective through experience in adjudication, there is a real danger in the opposite being true. People may, through lack of working experience, be in danger of forgetting even that which they learned in training. This must emphasise the importance of continuing education and of periodic re-assessment of competence if we are not to exacerbate current concerns about the quality of adjudicators.

Of the 2,569 adjudications we were able to directly analyse, almost exactly one third (868) were between contractor and client; 55% (1418) were between sub-contractor and contractor, with a further 6% (162) between layers of sub-contractors. Only 96 adjudications, or less than 4%, involved a consultant.

The final survey results are due to be published by CIC next month and in addition to the points which I have already made, they will deal with information such as the levels of fee charged; the value of dispute referred to adjudication; the nature of the disputes; who appointed the adjudicators; challenges to jurisdiction and so on.

If you would like a copy of the full report look on the CIC website (www.cic.org.uk) next month for details.

'Accelerating Change'

The statutory right to adjudication was one of the major legacies of Sir Michael Latham's excellent report *Constructing the Team* - published eight years ago during the 1994 World Cup! I do not always measure time by major footballing events but it is just that I vividly recall trying to read the Latham Report whilst the semi-final was being played and there seems to be a nice synergy now that another four year cycle is about to come to a climax.

In announcing his report, Sir Michael referred back to the Banwell and Simons Reports of previous decades and hoped that there would not be another major Government sponsored report into the state of the construction industry for another decade. Well, since Latham, we have had the Egan Report *Rethinking Construction* in 1998 and now *Accelerating Change***,** the report of the Strategic Forum for Construction, chaired by Sir John Egan. Unlike *Rethinking*

Construction, which was handed down from above, *Accelerating Change* is very much a consultation paper. It challenges everyone involved directly or indirectly with the procurement and provision of construction to contribute to the draft vision, and the ideas and proposals put forward in the draft.

In essence, the proposals are split into three categories:

- client leadership – in which CIC is very involved in the development of independent client advice;
- integrated teams; and
- culture change through ‘people’ issues (such as health and safety, training and diversity).

Design Quality Indicators

The report promotes the use of the Design Quality Indicator (DQI) to improve design and add value to the built environment. The DQI is a CIC initiative, and I am delighted to say that we are well supported by many government departments, the Commission for Architecture and the Built Environment and a wide range of other parties from the Design Council to the Major Contractors Group.

In an era where we are all driven by initial cost and time, the DQI is a valuable tool to enable the crucial measurement of quality and whole-life considerations. There are four key contextual points which underpin our central intent for the DQI:

First, the DQI is about raising the average in the quality of our built environment. It is about achieving better buildings through adding more value for money, by focusing on improved design quality at every stage. It is *not* (certainly not) about spending more money: it is about getting more value for what we spend.

Secondly, the mechanism to achieve this is not a costly or bureaucratic exercise; it can be completed easily in just 20 minutes. Nor does it require any technical knowledge of the building process. The DQI enables input from everyone involved – or with an interest in – a building and its development. So, for example, in a school project the views of the headmaster or mistress, teachers, caretaker, pupils and parents would be collected alongside those of the design and construction team.

Finally, the DQI is intended for use at each stage in a project’s life, from setting the brief through to the building’s occupancy and use. It works best if it can be used at every stage to see if the initial aspirations for design quality are being met during the project’s evolution.

We will launch the DQI with the first 100 trailblazing firms at the Design Council on 8th July. If you want to know more about it just contact CIC.

The *Accelerating Change* report is seeking to set some far reaching targets in each of these areas and there is scope for everyone to try and influence this process. If therefore you have not already done so, get onto the web and access the draft *Accelerating Change* document on www.cbpp.org.uk. You have until 31st May to submit your views.

There has been a lot of conjecture recently about what will happen to the Strategic Forum when Sir John Egan exits stage-right to become President of the CBI next month. I feel very strongly that this presents the established industry with an opportunity to make good what it lost with the demise of the CIB, exactly one year ago.

I am therefore very pleased to report that CIC, alongside the other construction umbrella bodies, has put proposals to the construction industry Minister, Brian Wilson, for a new industry owned and led Strategic Forum. The Minister has welcomed these proposals and we are now working up the detailed methodology with our colleagues in CUB and at the DTI. We plan to launch the new industry owned Strategic Forum on 12th September. As an associate member of CIC, I would welcome any views from the SCL on this development.

SCL's Delay Protocol

Like many of us here, I am a keen reader of Tony Bingham's excellent columns in *Building* (I do not know if there are awards for specialist columnists in the business press but, if there are, Tony should have won a few by now). On Friday last, my jaw fell when I read Tony Bingham's view that the SCL was about to 'drop a clanger' … it turned out that the perceived clanger in question was the imminent publication of the Society's *Protocol for Determining Extensions of Time and Compensation for Delay and Disruption*. Tony's concern was that he feels that the Society works very well as a platform for many individual views but should not put its collective weight behind a single voice or a single publication.

My knees are knocking as I contemplate the prospect of taking issue with Tony Bingham, whose work and writing I admire hugely, but from the perspective of a non-lawyer working on behalf of the construction industry and built environment professionals, it seems to my simple mind that what the construction industry needs above all else in its interface with construction law is as much certainty as it can reasonably muster.

I welcome the Protocol: because it is what it is. It represents so much more to us, on the other side of this particularly large fence, and – with respect – this is so much more than the myriad views of so many talented individuals all (if I may say so) champing at the bit to disagree with one another. So, please SCL, publish and discuss as many individual members' views as you wish – but from time to time, give us something that comes with the combined weight of the Society behind it.

Graham Watts is Chief Executive of the Construction Industry Council.