

TeCSA

TECHNOLOGY AND CONSTRUCTION SOLICITORS ASSOCIATION

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Technology and Construction Solicitors' Association

Chairman's Report 2012

This is the Annual Report of TeCSA covering the 12 months since last year's AGM on 10 November 2011.

During this period the Officers of TeCSA have been:

Chairman: Simon Tolson
Secretary: Julia Court
Treasurer and Membership Secretary: Ann Levin
Social Secretary: Dominic Helps

Hon. President: John Bishop
Hon. Vice Presidents: James Hudson and Robert Fenwick Elliott

In addition to the Officers, the members of the Committee have comprised:

Ms Caroline Cummins, Ms Sally Davies, Mr Kevin Forsyth, Mr William Gard, Mr Andrew Hibbert, Ms Caroline Pope, Ms Suzanne Reeves, Mr Ian Rogers, Mr Steven Williams, Mr Christopher Hill.

Our co-opted members of Committee have been Peter Rees QC, Simon Baylis and Stacy Sinclair and TeCSA is grateful for their support.

Membership of TeCSA now stands at 176 fully paid (192 last year).

This year has been a particularly energetic one for TeCSA and the following is just a brief summary of its activities.

1. TeCSA/TECBAR Symposia in London

The annual symposia which TeCSA organises every year in union with TECBAR was held in BLP's fine Auditorium on 25 June 2012, titled: *The Interventionist judge and case effective case management for the better*. Chosen as the theme because it forms a central plank of the forthcoming package of interlocking civil justice reforms from Lord Justice Jackson's *six propositions*. The goal of which is to enable both practitioners and the courts to deliver the best possible service to civil litigants at the lowest possible cost.

Topics included dealing with Lord Neuberger's speech calling for a debate about the extent of the need for live evidence; tips and tactics for hearing complex evidence-heavy cases in shortened trial windows; "Is it ever the Judge's fault?"; the new test of Lord Neuberger and the rule to be contained in CPR 44.4(5) was announced as the latest cost proportionality test that will come into force from April 2013.

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Mr Justice Akenhead addressed the subject of consistency of case management and Mr Justice Ramsey the topic of Costs Management Orders. Our other speakers were Fiona Parkin QC, Piers Stansfield QC, Nicholas Gould and Kwadwo Sarkodie. Naturally, views from all sides were richly exchanged.

The conference was very well attended and feedback was excellent.

2. Adjudication

TeCSA is an Approved Nominating Body under the HGCRA, and the TeCSA Adjudication Rules are in widespread use in construction contracts, it is good to see LOCOG adopted them. TeCSA has led the way thanks to the great work of its adjudication sub-committees.

In the last 12 months, we have made 78 adjudication nominations (73 last year); so this is a slight increase compared with last year, and the year before that when we had 61 nominations - but rather less than the 113 adjudications in 2010. The average number of nominations in the years before then has been 77, so we are staying broadly level.

In response to developments in the law and because of the need to maintain standards, the Committee carried a detailed review of its Adjudication Rules, and has established a new set of criteria for its adjudicators with its *Adjudication Service*, revised most recently on 12 September 2012.

The TeCSA Adjudication Service is now fully invoked and set out in full on the website <http://www.tecsa.org.uk/adjudication>.

TeCSA has pushed ahead with a continuing professional development and vetting regime for the panel ensuring our adjudicators are amongst the best trained and suited by experience, knowledge and background. That work continues through our Adjudication sub-committee.

Today we held our Adjudication Conference, which included an update on the Adjudication Rules and Procedure; Case Law Update covering *Highland and Islands v Shetland* to *Systech v PC Harrington*; we had a most interesting facilitated panel discussion on latest experience in Adjudication, sessions on decision writing and meetings, oral evidence and jurisdiction.

A great deal of work was also carried out this year assessing and interviewing many on the panel.

We also have 12 new entrants to the panel:

1. Peter Aeberli
2. Stephen Bickford-Smith
3. Peter Collie
4. Jonathan Cope
5. James Coppinger
6. Nigel Davies
7. Mark Dixon
8. Jason Farnell
9. Nicholas Gould
10. Mark Pontin
11. Robert Sliwinski
12. Peter Vinden

No one can renew his or her adjudication panel membership until submittal of a satisfactory CPD return and then pending periodic assessment pass the board. Formal assessment will be at least every 5 years.

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3. Consultation

Pre-Action Protocol

TeCSA through its Chairman and ex Chair and Committee Member Caroline Cummins has actively participated in the Technology & Construction Court Users Committee Working Group on Pre action Protocol; we are still waiting to see the final form of the new PAP that will greet us next April.

TeCSA has made known it was the unanimous view of the Committee that the survey results from the PAP questionnaire (*Survey Monkey*) in October last year were not a mandate for making PAP voluntary. TeCSA stands up for the Protocol and recorded its support for it.

The survey data showed 47% of respondents said leave it alone and only 11% to scrap it. Just a small number of respondents said make PAP voluntary. In fact, analysis of the *Survey Monkey* Data shows 13, or so, of 172 wanted to make PAP voluntary, that is only just over 7% of the sample.

TeCSA's view is that settlement short of litigation is almost always an ideal outcome for clients and PAP had a good strike rate for sound commercial reasons. By making it voluntary, would do away with an established proven feature of best practice.

It seems the majority of the Committee consider that PAP provides the parties with an important and valuable opportunity to lay the ground to settle without wasting further costs in court. This is a real quality. Occasionally some 'gamesmanship' occurs, but there are ways of dealing with that. To do away with the Protocol, or to curtail its application, is likely to lead to more disputes going to trial, resulting in greater costs for the parties and the court service/MoJ.

The Committee felt that consideration should be given to the *pre action meeting* not being compulsory. Some thought that an ADR opt in, or peel off to court after the PAP Letter of Response, was the change that resolved this concern.

TeCSA has therefore played a large part in upholding the benefits of the Pre-Action Protocol for Construction and Engineering Disputes, but the feel is it is rowing against the judicial tide and the stakes of the bar. Whether it bears fruit in holding the line, we may not know for sure until next April. It is expected that it will still be there but a voluntary best practice rather than mandatory given the continuing trend to a certain level of homogenisation of practice in the High Court following the move to the Rolls Building.

Costs Pilot

On 1 October 2011 the Costs Management Pilot (the "Pilot") started in all Technology and Construction Courts ("TCC") and Mercantile Courts. The Pilot applies to any case, which has its first case management conference on or after 1 October 2011¹ and is scheduled to now run until the extended date of 31 March 2013.

The purpose of the Pilot, as stated by Lord Justice Jackson in the introduction to the questionnaires being distributed by the courts to those participating in the Pilot, is to ascertain:

- (a) the benefits and disadvantages of costs management; and
- (b) how the process might be improved for the benefit of court users.

¹ See Practice Direction 51G - Costs Management in Mercantile Courts and Technology & Construction Courts - Pilot Scheme paragraph 1.1(3).

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The Pilot has potentially wide implications for costs management in the TCC and Mercantile Courts and has already been the subject of heated debate amongst practitioners regarding its potential advantages and disadvantages.

TeCSA has sponsored the Centre of Construction Law at King's College, London, in this research; King's published its interim report on 3 February 2012. It is available on the TeCSA website. The final report is due next spring.

According to the Interim Report, it seems that solicitors in general have a mixed opinion of the Pilot. Significant concerns are expressed that the Pilot increases costs due to the time taken to comply with it. This is despite the fact that for most respondents, filling out of Form HB only took between two and three hours with only one solicitor taking over five hours. However, feedback from costs draftsmen and other sources has indicated that, in London at least, the process can take considerably longer, although this is not borne out by the questionnaires received to date.

Having said this, solicitors interviewed seem to acknowledge that the Form HB would become easier to deal with once familiarity with it increased and if the feedback as to how the Form HB is taken on board, this may also assist the process. Solicitors also highlighted that the Pilot did assist with early attention to costs, that this allowed their clients to better understand their potential liabilities (including their potential liability to the other party if they did not win) and could also assist with settlement. It will be interesting to see the views of solicitors representing parties in higher value cases, particularly in the London TCC, as the responses to date represent relatively low value claims, with only one claim being worth over £500,000.

In relation to the judges' views, they generally seem to believe that the Pilot encouraged proportionality of costs to the value of the claim, that the current scheme worked well and did not require improvements. Other advantages included that it aided case management as well as controlling future costs. However, we would note that the majority of responses from judges came from a very limited number of individuals and courts and accordingly any findings should be treated with caution at this stage.

I am told when the cost reforms are finally to be implemented next Spring, there will be some significant changes to the civil procedure rules. We will have additions to CPR3 (3.11 to 3.18), a new Practice Direction 3E and amendments to Section 6 of the Costs Practice Direction.

One thing is sure there is a desperate need for help and guidance and working together for solicitors in the e-disclosure (the subject of our symposia last year) and the new cost budget areas. It seems this is top of the list of judicial concern too. TeCSA will come up with ways to support the spread of knowledge and understanding in both areas (and to create a more level playing field from which the judges can make decisions that they are confident will be fairer and more likely to work in practice).

4. International Construction Law Conference 24 September 2012

The Technology & Construction Court and SCL, TeCSA and TECBAR hosted this unique conference jointly.

It is a particular pleasure to welcome so many delegates from the increasing number of diverse associated organisations throughout the world. We are particularly delighted to have a delegation from the prestigious American College of Construction Lawyers and the Canadian College of Construction Lawyers. It brought together construction lawyers and practitioners from across the world to discuss contemporary issues in construction law and dispute resolution to commemorate the first year anniversary of the opening of the new Rolls Building in London. TeCSA undertook plenty of hard work behind the scenes to make this event happen and in selecting the speakers including from amongst their own (Robert Fenwick Elliott and Edward Corbett to name two).

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The conference was held at the Institution of Engineering & Technology (IET), Savoy Place, in Central London and concluded with a Drinks reception at the Rolls Building, and at a dinner in the Great Hall at the Royal Courts of Justice.

We had sessions on Procurement and International Advocacy in the morning, after lunch, the discussions were on International Arbitration Tribunals and the Analysis of Delay in different jurisdictions, East meets West style.

Keynote speeches came from the highest of the Judiciary including Lord Chief Justice Judge, Lord Dyson MR, Lord Justice Jackson and Sir Anthony May and were attended by all the London TCC High Court Judges.

5. Social

This year's TeCSA Summer Party was held on Norton Rose's fabulous roof terrace overlooking the Thames on 11 July 2012. Attendance was excellent. We made a profit too!

The last Annual Dinner was also a great success. It is hoped tonight will be equally good, if not better. I shall be speaking for a shorter period!

A big thank you to Dominic Helps and Sally Davies.

6. Marshal Scheme

TeCSA continues to coordinate a Marshal Scheme whereby trainees and junior solicitors are able to sit with a TCC Judge in a court hearing for a week to gain insight and experience. Over the last complete "sitting" year, a few less marshals took part (9 did so) than the 17 last year as it seems a number who put their names down were taken away by fee earning demands. The scheme remains extremely popular and has been well supported by the TCC Judges; we just need to ensure slots are kept. I giant thank you to Will Gard for helping make this system so accessible.

7. Technical Course

No courses were held this year to allow a breather after four continuous years 2006 - 2010. It is planned to review the position this coming year. However, 2013 will see more training in the calendar.

8. Single European contract law - the Common European Sales Law (CESL)

Following the publication in 2010 of the European Commission's green paper on policy options building towards a European contract law for consumers and businesses, TeCSA (Julia Court and Dominic Helps on Committee) have investigated what Ken Clarke has called the "*Esperanto fallacy*" when he chastised the European Commission effort² to introduce a Europe-wide contract law, which aims to break down barriers

² Largely propounded by Viviane Reding Vice-President of the European Commission, EU Justice Commissioner Justice Council.

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to free trade. Warning that it could be “unnecessary, disproportionate and damaging”, he said the wrong type of contract law could lead to “years of litigation”.

On 11 October 2011, the European Commission released its proposal for an ‘optional’ Common European Sales Law (CESL). In May TeCSA participated in the consultation at the invitation of the Law Society to the call for evidence by the Ministry of Justice and Department of Business, Innovation & Skills concerning the proposal for a Regulation on a Common Sales Law for the European Union. This covers business-to-consumer and business-to-business contracts for the sale of goods (including digital content) and related services (with some exclusions, including for financial services).

TeCSA supports freedom of contract, and like the Law Society is concerned to ensure that any new instrument would not impact on the certainty available under existing national systems of law or the integrity of those systems for those who wish to use them. TeCSA has expressed the view that we have at the moment 27 systems of contract law available for use in the single market and we are yet to see the evidence to persuade us that they are causing real difficulty for traders and consumers.

TeCSA considers the range of statistics provided by the Commission require far greater analysis before it can be credibly claimed to provide evidence of a clear ‘need’ for the CESL.

TeCSA submitted it is peculiarly well placed to comment upon the desirability or otherwise of this initiative from the perspective of the construction and engineering sectors. Its members are actively involved both at the front end, in advising on the use of standard forms and/or their amendment and drafting and negotiating bespoke forms of contracts and contracting systems for more complex projects stretching from major building projects through infrastructure to power and energy related projects, and in the application of all forms of dispute resolution to solve the many disputes and problems that the execution of complex projects of this nature tend to generate.

The construction and engineering sectors are no strangers to initiatives to improve in some way or other its contractual and related arrangements. Over the last 50 years there have been a number of industry/government reviews, such as the Latham and Egan reviews in 1994 and 1998 respectively, all of which have had a real impact upon how these industries conduct themselves. The Latham review led directly to the introduction of legislation in the shape of Part II of the Housing Grants, Construction and Regeneration Act 1996, which made a completely unprecedented intervention into the contractual practices of the industry. Quite apart from government initiatives such as that, there are a number of established pan-industry and other bodies which produce a wide variety of standard form of contracts applicable to all forms of project or undertaking. These documents have taken, in some case, literally generations to develop. TeCSA stated its strong impression is that those operating within these industries would not welcome or be interested in change for which there is no clearly demonstrable case on the basis of necessity or actual benefit.

9. Information

The new TeCSA website launched in July now contains valuable information for members and non-members alike and is much improved. We do not rest on our laurels.

Our IT Protocol is being modernised for the age of the Ipad, BBM, Twitter, Skype www.tecsa.org.uk.

10. Officer and Committee Elections and rules 14 and 15

As well as Committee elections, the Officer positions were due for re-election today. The Chairman, Treasurer and Secretary confirmed they were willing to re-stand.

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In respect of the Officer positions, Simon Tolson (Chairman), Ann Levin (Treasurer) and Julia Court (Secretary) all agreed to stand for re-election. Simon Tolson, Ann Levin and Julia Court to the positions of Chairman, Treasurer and Secretary respectively were uncontested.

Rule 9 provides in each Annual General Meeting one third (or as near one third as may be) of the elected members shall retire, but with the right to offer themselves for re-election. The members to retire shall be those who have been longest on the Committee since election or re-election, ties (unless otherwise agreed) to be determined by lot.

There were currently ten elected members of the Committee, which means three members were due for re-election. However, the Constitution allowed for twelve Committee members so there would be a total of five places available. Kevin Forsyth was the longest standing Committee member and thereafter Suzanne Reeves, Caroline Pope, Andrew Hibbert and Steven Williams. Rupert Choat of CMS and Matthew Smith of KL Gates also wished to stand.

The Committee Member elections were also uncontested. After drawing lots, Suzanne and Steven fell for re-election with Kevin. However, we had five places and five nominations (Kevin, Suzanne, Steven and Rupert and Matthew). No further names came in so the three existing Committee members have been re-elected and Rupert and Matthew elected as new members.

The election results will be formally announced at the AGM today.

I am delighted Rupert Choat of CMS Cameron McKenna and Matthew Smith of KL Gates have been elected for the first time to the TeCSA Committee.



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Simon Tolson
Chairman
15 November 2012